(1)

Supreme Court, U.S.
FILED

96 250 AUG 13 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

KHD DEUTZ OF AMERICA CORPORATION,

Petitioner,

v.

RONALD STEWART, DAVID KIRCHOFF, DARRELL L. HOWARD, LOUIS KUBITSCHEK, JOHN TUCKNESS AND RONALD KELTNER, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD SHAPIRO*
McCALLA, THOMPSON,
PYBURN, HYMOWITZ & SHAPIRO
650 Poydras Street
Suite 2800
New Orleans, Louisiana 70130
(504) 524-2499
Attorney for Petitioner

*Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

81 pp

QUESTIONS PRESENTED

Respondents Ronald Stewart et al. bring a claim for retiree health benefits under § 502 of the Employee Retirement Income Security Act ("ERISA") and § 301 of the Labor Management Relations Act ("LMRA"). Respondents seek under § 502(a)(1)(B) & (a)(3) of ERISA and § 301 of the LMRA identical relief: Injunctive relief and recoupment of any medical expenses occasioned by any alleged unlawful change in the plan. Although the court below agreed Respondents were not entitled to a jury trial on their ERISA claims, it nonetheless held that, because the § 301 claim is considered a contract claim, Respondents were entitled under the Seventh Amendment to a jury trial on their § 301 claim. The questions presented are:

1. Whether the federal common law embodied in a § 301 claim for ERISA benefits is displaced by or adopts the equitable nature of an ERISA claim for benefits.

2. Whether, assuming the § 301 claim can be characterized as a "contract" claim, Respondents are entitled to a jury trial on a § 301 claim in which they bring the venerable contract action for specific performance, an issue as to which the courts of appeal are in conflict.

LIST OF PARTIES

KHD Deutz Corporation of America ("KHD Deutz") is the Petitioner. Respondents are Ronald Stewart, David Kirchoff, Darrell L. Howard, Louis Kubitschek, John Tuckness and Ronald Keltner, who represent a class of former employees of a combine manufacturing plant in Independence, Missouri, who retired between May 26, 1985, and December 31, 1989.

RULE 29.6 LISTING

KHD Deutz is a subsidiary of Klockner-Humbolt-Deutz, AG, and has the following non-wholly owned subsidiaries: Deutz Corporation, R & B Filtration Systems, Inc., Humbolt Decanter, Inc., Humbolt Wedag, Inc., and Schmidt-Bretten, Inc.

KHD Deutz also had a wholly-owned subsidiary, the Deutz-Allis Corporation, which owned the plant in Independence, Missouri, from which the benefit claims at issue arise. The Deutz-Allis Corporation owned the plant from May 26, 1985, until June 21, 1990, when KHD Deutz sold Deutz-Allis to the Allis-Gleaner Corporation. KHD Deutz, however, retained responsibility for health and welfare benefit payments for employees who retired between May 25, 1985, and December 31, 1989.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. SUMMARY OF REASONS 8

II. THE FRAMEWORK FOR ANALYSIS AND THE DECISON BELOW 12

III. A § 301 CLAIM FOR ERISA BENEFITS SHOULD ASSUME THE EQUITABLE NATURE OF AN ERISA CLAIM FOR BENEFITS ON THAT SAME PLAN 13

IV. EVEN IF THE § 301 CLAIM WERE CONSTRUED AS A "CONTRACT" CLAIM, THE TYPE OF CONTRACT CLAIM AT ISSUE HERE IS, AS THE SIXTH CIRCUIT RECOGNIZED AND THE ELEVENTH CIRCUIT APPARENTLY REJECTED, ONE FOR "SPECIFIC PERFORMANCE," AN EQUITABLE ACTION 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 11

Beacon Theaters v. Westover, 359 U.S. 500 (1959) 23

Blake v. Unionmutual Stock Life Ins. Co., 906 F.2d 1525 (11th Cir. 1990) 18

Bower v. Bunker Hill Co., 114 F.R.D. 587 (E.D. Wash. 1986) 8

Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980) 18

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) ..... *passim*

Chicago M & St. P. Ry. v. United States, 218 F. 288 (9th Cir. 1914), *aff'd*, 244 U.S. 351 (1917) 21

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 14, 15

County of Mobile v. Kimball, 102 U.S. 691 (1881) 21

Curtis v. Loether, 415 U.S. 189 (1974) 23

Daniel v. Eaton Corp., 839 F.2d 263 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988) 18

Dennis v. Sawbrook Steel Castings Co., 792 F. Supp. 552 (S.D. Ohio 1991) 8

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 15, 16

Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir. 1996), *cert. filed* 64 USLW 3727 (Apr. 17, 1996) 7, 8, 23, 24

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 12

TABLE OF AUTHORITIES – Continued

Page

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 19

Hechenberger v. Western Elec. Co., 570 F. Supp. 820 (E.D. Mo. 1983) *aff'd*, 472 F.2d 453 (8th Cir. 1984) ...8, 9

Hepburn & Dundas's Heirs v. Dunlop & Co., 14 U.S. (1 Wheat) 179 (1816) 21

Illinois v. Milwaukee, 406 U.S. 91 (1972).....14, 15

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 9

Kirk v. Provident Life & Accident Ins. Co., 942 F.2d 504 (8th Cir. 1991)..... 18

Local 836, United Auto Workers v. Echlin, Inc., 670 F. Supp. 697 (E.D. Mich. 1986) 8, 9

Markman v. Westview Instruments, 116 S. Ct. 1384 (1996) 11, 20

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 15, 17, 18, 20

Meredith v. Allsteel, Inc., 1994 WL 383925 (N.D. Ill. July 19, 1994) 8

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) 11, 15, 17

Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat) 290 (1817) 21

Nachman Corp. v. Pension Ben. Guaranty Corp., 446 U.S. 359 (1980) 15, 17

Pane v. RCA Corp., 868 F.2d 631 (3rd Cir. 1989)..... 18

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 9, 17, 18, 20

TABLE OF AUTHORITIES – Continued

Page

Ross v. Bernhard, 396 U.S. 531 (1970) 21, 24, 25

Schalk v. Teledyne, Inc., 1993 WL 432410 (W.D. Mich. July 20, 1993) 8, 9

Senn v. United Dominion Industries, Inc., 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) 8, 9

Smith v. ABS Industries, Inc., 653 F. Supp. 94 (N.D. Ohio 1986) 8, 9

Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993)..... 18

Stewart v. KHD Deutz of America, Corp., 980 F.2d 698 (11th Cir. 1993)..... 5

Textile Workers Union of Alabama v. Lincoln Mills, 353 U.S. 448 (1957) 13, 19

Tull v. United States, 481 U.S. 412 (1987)..... 12, 21, 23

Varity Corp. v. Howe, 116 S.Ct. 1065 (1996)..... 15, 17

Wardle v. Central States, Southeast & Southwest Area Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981)..... 18

CONSTITUTION OF THE UNITED STATES

Seventh Amendment..... *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2072..... 2, 3, 10, 24

28 U.S.C. § 1292(b) 1, 6

TABLE OF AUTHORITIES – Continued

Page

Labor Management Relations Act of 1947
29 U.S.C. § 185 ..... *passim*

Employee Retirement Income Security Act of 1974
29 U.S.C. § 1002(21)(A) 17

29 U.S.C. § 1021 16

29 U.S.C. § 1021(a)(2) 16

29 U.S.C. § 1022 16

29 U.S.C. § 1023 16

29 U.S.C. § 1024 16

29 U.S.C. § 1024(b)(3) 16

29 U.S.C. § 1024(b)(4) 16

29 U.S.C. § 1102(a) 16

29 U.S.C. § 1104(a)(1) 17

29 U.S.C. § 1105 17

29 U.S.C. § 1106 17

29 U.S.C. § 1132 ..... *passim*

29 U.S.C. § 1144(d) 18

29 U.S.C. § 1162(1) 17

29 U.S.C. § 1162(2)(A)(iv) 17

29 U.S.C. § 1162(3) 17

29 U.S.C. § 1163(1)(3) 17

29 U.S.C. § 1163(5) 17

29 U.S.C. § 1165 17

29 U.S.C. § 1166(a)(4) 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE at § 2304 (1995) 7

BNA Daily Labor Report, Health Insurance: Group Health Covers Most Americans, According to New Study of Benefit Data, August 29, 1995, at A-5 10

BNA Daily Labor Report, House Democratic Leaders Near Completion of Health Care Package, July 29, 1994, at A-19 11

BNA Daily Labor Reporter, GM Will Require Retirees, Salaried Employees to Begin Paying for Health Insurance Coverage, September 10, 1993, at A-16 11

BNA Pension & Benefits Reporter, Health Costs: Health Benefits Costs Continue on Mode Rate Path, Survey Finds, February 5, 1996, Vol. 23, No. 6 at p. 417 10

BNA Pension Reporter, Accounting: AT&T Anticipates One-Time Charge of Over $5 Billion for Retiree Benefits, December 9, 1991, Vol. 18, No. 49 at p. 2224 11

BNA Pension Reporter, Retiree Benefits: Ford Says it Lost $7.4 Billion in 1992 Due to FASB Accounting Change, February 15, 1993, Vol. 20 at p. 429..... 11

DAN DOBBS, LAW OF REMEDIES, at § 12.8(1), p. 805 (West 1993)..... 21

TABLE OF AUTHORITIES – Continued

Page

EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE & INJUNCTIONS at § 21.2.1.1, pp. 47-72 (Little Brown 1989) 22

Fed. R. Civ. P. 38(b) 7

RESTATEMENT (SECOND) OF CONTRACTS at § 357 & comm. a. (1981) 21

RESTATEMENT (SECOND) OF CONTRACTS at § 358(3) & comm. c. (1981) 22

RESTATEMENT OF CONTRACTS at § 365 & comm. d. (1932) 22

STATEMENT OF LABOR SECRETARY ROBERT B. REICH BEFORE HOUSE APPROPRIATIONS SUBCOMMITTEE ON LABOR, HHS EDUCATION, *reprinted in BNA Daily Labor Report*, May 8, 1996, at E-4 10

U.S. DEPT. LABOR FISCAL YEAR 1997 BUDGET ESTIMATE, *reprinted in BNA Daily Labor Report*, March 20, 1996, at E-23 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner KHD Deutz respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on February 28, 1996.

OPINIONS BELOW

The decision of the court of appeals is reported at 75 F.3d 1522 (11th Cir. 1996) and is reproduced in Petitioner's Appendix ("Pet. App.") at App. 1-15. The decision denying the petition for rehearing is unreported but is included in Pet. App. at App. 32-33. The decision of the district court is unreported but is included in Pet. App. at App. 16-28. The decisions seeking and granting § 1292(b) certification to appeal the jury issue are unreported but are included in Pet. App. at App. 29-31.

JURISDICTIONAL STATEMENT

The court of appeals opinion was entered on February 28, 1996. Petitioner filed a petition for rehearing, which was denied on May 15, 1996. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution and § 502 of ERISA, 29 U.S.C.

§ 1132, § 301 of the LMRA, 29 U.S.C. § 185, and the Rules Enabling Act, 28 U.S.C. § 2072. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 502 of ERISA provides in pertinent part:

> Civil enforcement
> (a) Persons empowered to bring a civil action A civil action may be brought –
> (1) by a participant or beneficiary – . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 301 of the LMRA provides in pertinent part:

> Suits by and against labor organizations
> (a) Venue, amount, and citizenship
> Suits for violation of contracts between an employer and a labor organization representing

> employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Rules Enabling Act provides in pertinent part:

> § 2072. Rules of procedure and evidence; power to prescribe
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and court of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

This petition arises out of Respondents' suit claiming entitlement to lifetime vested medical benefits under an ERISA welfare plan. Respondents comprise a class of former employees of a combine manufacturing plant in Independence, Missouri,[1] that was owned from May 26,

[1] The class consists of former employees who retired between May 26, 1985, and December 31, 1989.

1985, to June 21, 1990, by KHD Deutz.[2] Respondents' claim of vested medical benefits arises out of a health benefit agreement (the "Health Plan")[3] that was attached as an appendix to a 1984 and a 1986 Collective Bargaining Agreement ("CBAs") negotiated with Respondents' former representative, Local 1958 of the United Steelworkers of America ("USWA"). The CBAs and the Health Plan remained in effect without relevant change through May 1990.

The Health Plan expired May 19, 1990. Effective June 1, 1991, KHD Deutz implemented cost containment measures in an effort to control the escalating cost of providing the former employees with health and welfare benefits. Rather than completely eliminate insurance coverage, KHD Deutz created a credit toward premiums based on a formula that includes the retiree's age and length of service.[4] On July 3, 1991, Respondents brought suit, alleging one claim under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and

---

[2] KHD Deutz, through its subsidiary the Deutz-Allis Corporation, owned the plant from May 26, 1985, until June 21, 1990, when KHD Deutz sold Deutz-Allis to the Allis Gleaner Corporation. KHD Deutz, however, retained responsibility for health and welfare benefits for employees who retired between May 25, 1985, and December 31, 1989.

[3] For purpose of this Petition, the health benefit agreements attached to the 1984 CBA and the 1986 CBA are identical in all relevant essentials.

[4] Based upon this formula, at the time this suit was filed 27% of the retirees paid no premiums for health insurance.

four claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*[5] In their § 301 claim in "Count I," Respondents alleged in pertinent part:

> 16. As a result of the Company's actions, plaintiffs will suffer irreparable injury.
>
> 17. Plaintiffs have no adequate remedy at law to redress the injury they will suffer on account of the Company's actions.

Pet. App. at App. 39. Respondents also asked for a jury trial and, in their prayer for relief, they requested a preliminary and permanent injunction enjoining the changes in the benefit plan and recoupment of any medical expenses paid.[6]

After an earlier appeal and remand of this case,[7] the district court struck Respondents' request for a jury trial, concluding they are entitled to relief that is only equitable in nature. Regarding the jury demand, the district court

---

[5] Jurisdiction was invoked under § 301 of the LMRA, 29 U.S.C. § 185(a), and § 502 of ERISA, 29 U.S.C. § 1132(e) & (f). See Pet. App. at App. 35.

[6] See Pet. App. at 44-45. This Complaint also included other claims under ERISA and a demand for compensatory damages, including damages for emotional distress and exemplary damages, which, as explained in the text above, were struck by the district court and which ruling Respondents did not appeal.

[7] On July 5, 1991, Respondents filed a motion for a preliminary injunction, which motion was denied on December 16, 1991. Respondents appealed that denial to the Eleventh Circuit, which reversed and remanded for further proceedings in *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698 (11th Cir. 1993).

first held Respondents were not entitled to any extra-contractual relief – including, specifically, compensatory, emotional distress, or exemplary damages – on either their ERISA claims or their § 301 claim. Pet. App. at App. 21-24. Next, the district court struck Respondents' jury demand, concluding Respondents' remaining monetary remedies – which consisted of recoupment of any medical expenses incurred between the time of the change in the plan and the issuance of any requested injunction or judgment – were "equitable in nature." Pet. App. at App. 24-25. Respondents sought and received leave to appeal this jury ruling under 28 U.S.C. § 1292(b);[8] however, Respondents did not challenge the order striking their claim for any extra-contractual relief.

On appeal, the Eleventh Circuit agreed that the monetary remedies available under § 301 and ERISA were identical, consisting only of recoupment of any out-of-pocket expenditures described above. Pet. App. at App. 9 & n.4 & App. 13. The Eleventh Circuit also agreed no jury trial would be available for such a claim under ERISA and that, under ERISA, such monetary relief would be properly classified as "equitable." Pet. App. at App. 11. The Eleventh Circuit nonetheless concluded the Seventh Amendment entitled Respondents to a jury trial on the § 301 claim, reasoning the § 301 claim is a "contract" one that converts the identical equitable relief under ERISA into legal relief under § 301. Pet. App. at App. 9-11. The Eleventh Circuit also concluded ERISA was "irrelevant" to the characterization of the § 301 action as a "contract" action. Pet. App. at App. 8.

---

[8] Pet. App. at App. 29-31.

While this appeal was pending, the Sixth Circuit decided *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996), *cert. filed* 64 USLW 3727 (Apr. 17, 1996).[9] In *Kelsey-Hayes* the Sixth Circuit concluded this relief under § 301 for lost benefits was not legal relief, as it was "incidental to or intertwined with injunctive relief sought." Specifically, the Sixth Circuit concluded that such a claim was the venerable contract action for "specific performance" – an equitable action. The monetary relief sought under this equitable action was merely recoupment of medical expenses caused by delay that was "incidental to or intertwined with" the injunctive relief sought.[10] Accordingly, the Sixth Circuit concluded the Seventh Amendment conferred no right to a jury trial. *Id.* at 658-63.

---

[9] Petitioner KHD Deutz's understanding is that the petition for certiorari in the *Kelsey-Hayes* case, which raises the other side of the circuit conflict discussed in the text above, is still pending at the time of the filing of the instant petition.

[10] In *Kelsey-Hayes*, as in the instant case, plaintiffs brought a claim for vested lifetime medical benefits for retirees under ERISA and § 301. *Id.* at 652. Like Respondents here, the plaintiffs in *Kelsey-Hayes* seek specific performance via an injunction enforcing their claimed contractual right to vested lifetime medical benefits. *See id.* at 660. Indeed, the only distinction between the two cases is that in *Kelsey-Hayes* plaintiffs obtained the provisional relief of a preliminary injunction. *Id.* at 651. This distinction should be irrelevant for present purposes, however, because the right to a jury trial under the Seventh Amendment depends not on the relative preliminary merits of a party's claims, but on "the remedy sought" in the pleadings. *See, e.g., Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *see also Fed. R. Civ. P.* 38(b) (jury demand based on pleading); 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE at § 2304 (1995) (jury right determined from pleadings – collecting cases).

On Petition for Rehearing, Petitioner KHD Deutz asked the Eleventh Circuit to reconsider its decision in light of the circuit-conflict with the Sixth Circuit.[11] This petition was denied on May 15, 1996. Pet. App. at App. 32-33.

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF REASONS

The instant case involves a circuit conflict over an important and recurring question – whether a jury is available for suits brought under § 301 for ERISA benefits. This issue has been raised in numerous suits,[12] with conflicting results and disparate reasoning.[13] Until this

---

[11] Petitioner KHD Deutz had previously informed the Eleventh Circuit of this decision while the appeal was pending in a "28(j) Letter," dated January 23, 1996.

[12] In addition to the instant appellate decision, there is, *e.g.*, *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 658-63 (6th Cir. 1996), *cert. filed*, 64 USLW 3727 (April 17, 1996); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 813-14 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *Hechenberger v. Western Elec. Co.*, 570 F. Supp. 820, 822 (E.D. Mo. 1983) *aff'd*, 742 F.2d 453 (8th Cir. 1984); *Meredith v. Allsteel, Inc.*, 1994 WL 383925 at *4 (N.D. Ill. July 19, 1994); *Local 836, United Auto Workers v. Echlin, Inc.*, 670 F. Supp. 697, 707-08 (E.D. Mich. 1986); *Smith v. ABS Industries Inc.*, 653 F. Supp. 94, 97-99 (N.D. Ohio 1986); *Dennis v. Sawbrook Steel Castings Co.*, 792 F. Supp. 552, 559-60 (S.D. Ohio 1991); *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 597-98 (E.D. Wash. 1986); *Schalk v. Teledyne, Inc.*, 1993 WL 432410 at *2-4 (W.D. Mich. July 20, 1993).

[13] *Cf., e.g., Kelsey-Hayes*, 73 F.3d at 658-63 (§ 301 action is equitable action for specific performance); *Meredith*, 1994 WL

Court renders a definitive decision, the law on this issue will remain in disarray with the attendant loss of uniformity in federal law, a uniformity that is particularly acute given the subject matter involves enforcement of claims to ERISA benefits. *Cf., e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987).

Moreover, as explained below, the Eleventh Circuit's decision on this issue is in error. In addition to exacerbating the conflict in what is supposed to be uniform federal law, this error has the following unfortunate consequences:

1. This expansion misconstrues the relationship between § 301 and ERISA by allowing § 301's judge-made common law to trump the "interlocking, interrelated, and interconnected" statutory remedial scheme – an equitable scheme – set forth in ERISA.

2. The Seventh Amendment requires simply that the right to jury trial be "preserved." The unwarranted expansion of Seventh Amendment rights caused by going beyond this plain language can lead to unwarranted contraction if juries later came to be disfavored. *E.g., Terry*, 494 U.S. at 558, 593

383925 at *4 (same); *Hechenberger*, 570 F. Supp. at 822 (no distinction between plans that were collectively bargained and those that were not) *with, Senn*, 951 F.2d at 813-14 (§ 301 action is simply contract action for compensatory damages); *Schalk*, 1993 WL 432410 at *3 (plaintiffs entitled to compensatory damages under § 301); *Echlin*, 670 F. Supp. at 707 (ERISA claim is merely derivative of § 301 claim); *Smith*, 653 F. Supp. at 98-99 (distinguishing by type of factual claim at issue).

(Kennedy, J., joined by O'Connor and Scalia, JJ., dissenting).

3. To the extent the expansion here is rested on the procedural rules merging law and equity, such expansion would violate the Rules Enabling Act's specific statutory command that such rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b).

Finally, and perhaps most important, such an expansion would upset the carefully crafted enforcement scheme for determining entitlement to ERISA benefits. Benefit plans under ERISA control trillions of dollars in assets and make hundreds of billions in pension and welfare benefit payments yearly. Currently, there are approximately 700,000 private pension plans and 6 million welfare benefit plans regulated by ERISA whose assets total $3.5 trillion and which cover around 150 million people.[14] Health benefit payments total hundreds of billions a year,[15] and accrued liability for retiree health benefits alone was estimated to be $412 billion as of

---

[14] *See* U.S. DEPT. LABOR FISCAL YEAR 1997 BUDGET ESTIMATE, *reprinted in BNA Daily Labor Report*, March 20, 1996, at E-23; STATEMENT OF LABOR SECRETARY ROBERT B. REICH BEFORE HOUSE APPROPRIATIONS SUBCOMMITTEE ON LABOR, HHS EDUCATION, *reprinted in BNA Daily Labor Report*, May 8, 1996, at E-4.

[15] For example, in 1993 public and private employers spent $235.6 billion on group health insurance alone. *BNA Daily Labor Report, Health Insurance: Group Health Covers Most Americans, According to New Study of Benefit Data*, August 29, 1995, at A-5; *see also, e.g., BNA Pension & Benefits Reporter, Health Costs: Health Benefits Costs Continue on Mode Rate Path, Survey Finds*, February 5, 1996, Vol. 23, No. 6 at p. 417 (cost for health benefits per-employee averaged $3,821 in 1995).

1993.[16] These assets and payments are regulated under a "comprehensive and reticulated" statute – ERISA – and are typically subject to complex, interrelated plan documents. As this Court recently recognized in *Markman v. Westview Instruments*, 116 S. Ct. 1384, 1395-96 (1996), judges are better equipped than juries to undertake the complex textual exegesis necessary to reach correct results – especially when such exegesis must be undertaken in light of the complex statutory provisions and competing policy preferences reflected in ERISA.[17] *Cf., e.g., Mertens v. Hewitt Associates*, 508 U.S. 248, 261-62 (1993); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514-15 (1981).

---

[16] *BNA Daily Labor Report, House Democratic Leaders Near Completion of Health Care Package*, July 29, 1994, at A-19. The retiree health benefit liability of three companies alone, AT&T, Ford, and General Motors – each of which has substantial contingents of employees who may bring suit under § 301 – totaled $33 billion as of 1992. *See, e.g., BNA Daily Labor Reporter, GM Will Require Retirees, Salaried Employees to Begin Paying for Health Insurance Coverage*, September 10, 1993, at A-16; *BNA Pension Reporter, Retiree Benefits: Ford Says it Lost $7.4 Billion in 1992 Due to FASB Accounting Change*, February 15, 1993, Vol. 20 at p. 429; *BNA Pension Reporter, Accounting: AT&T Anticipates One-Time Charge of Over $5 Billion for Retiree Benefits*, December 9, 1991, Vol. 18, No. 49 at p. 2224.

[17] As in *Markman*, there is no historical practice regarding jury trials on benefit claims for collectively bargained for benefit plans, as collective bargaining was unlawful in 18th-century England. *Cf. Terry*, 494 U.S. at 565-66 *with Markman*, 116 S.Ct. at 1390-92.

II. THE FRAMEWORK FOR ANALYSIS AND THE DECISON BELOW.

a. Neither § 301 of the LMRA nor § 502 of ERISA provides for a jury trial. In *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990), this Court set forth a test to use when the statute is silent to resolve the availability of a jury trial under the Seventh Amendment: "First, we compare the statutory action to 18th-century actions brought in England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 565 (citations omitted). In this test, the second, remedies inquiry is the "more important" of the two. *E.g., id.* at 565; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). This two-part "issues-remedies" test is, however, merely the means used to resolve the ultimate question: Whether the action at issue would have been tried in courts of law or courts of equity at the time of the adoption of the Seventh Amendment. *E.g., Tull v. United States*, 481 U.S. 412, 417-18, 421 & n. 6 (1987); *Terry*, 494 U.S. at 591-92 (Kennedy, J., joined by O'Connor and Scalia, JJ., dissenting).

b. Here, the Eleventh Circuit rested its holding Respondents were entitled to a jury trail on the notion the § 301 claim was a contract claim. Specifically, the Eleventh Circuit agreed the monetary remedies available under § 301 and ERISA were identical, consisting only of recoupment of any out-of-pocket expenditures described above. Pet. App. at App. 9 & n.4 & App. 13. The Eleventh Circuit also agreed that no jury trial would be available for such a claim under ERISA and that, under ERISA,

such monetary relief would be properly classified as "equitable." Pet. App. at App. 9-11. The Eleventh Circuit nonetheless concluded the Seventh Amendment entitled Respondents to a jury trial on the § 301 claim, reasoning that the § 301 claim is a "contract" one that converts the identical equitable relief under ERISA into legal relief under § 301. *Ibid.* The Eleventh Circuit also concluded ERISA was "irrelevant" to the characterization of the § 301 action as a "contract" action. Pet. App. at App. 8. As explained in the next section, the Eleventh Circuit erred when it characterized a § 301 claim for ERISA benefits on an ERISA benefit plan as a "contract" claim.

III. A § 301 CLAIM FOR ERISA BENEFITS SHOULD ASSUME THE EQUITABLE NATURE OF AN ERISA CLAIM FOR BENEFITS ON THAT SAME PLAN.

a. Section 301 is an empty vessel given content through federal common law. As enacted, § 301's sparse statutory language merely provides jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . " 29 U.S.C. § 185(a).[18] In *Textile Workers Union of Alabama v. Lincoln Mills*, 353 U.S. 448, 450-57 (1957), this Court concluded § 301's jurisdictional grant should be given content through federal common law, to be "fashion[ed] from the policy of our national labor laws."

---

[18] Section 301 also has provisions addressing venue, service of process, and determination of agency. 29 U.S.C. § 185(b)-(e). None of those provisions are at issue here.

b. Federal common law, however, is displaced whenever Congress "occupies the field" by enacting a comprehensive statutory scheme regulating the subject matter at issue. This principle was enunciated and applied by this Court in *Milwaukee I* and *Milwaukee II*. In *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*) this Court explicitly applied the principles of *Lincoln Mills* to create a federal common law of nuisance for water pollution. *Id.* at 103-08 & n. 5. Subsequently, Congress passed a comprehensive statutory scheme regulating water pollution under the 1972 Amendments to the Federal Water Pollution Act. In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*), this Court concluded this statutory scheme displaced the federal common law of nuisance in this area. First, this Court noted the subsidiary nature of federal common law:

> We have always recognized that federal common law is "subject to the paramount authority of Congress." It is resorted to "(i)n the absence of an applicable Act of Congress," and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone." Federal common law is a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

Id. at 313-14 (citations omitted). Second, this Court then concluded the 1972 Amendments were a comprehensive

statutory scheme that "occupied the field" of water pollution, thereby displacing the federal common law of nuisance previously recognized in *Milwaukee I*. *Id.* at 317-332. As this Court concluded:

> The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when [*Milwaukee I*] was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.[19]

c. ERISA is a "comprehensive and reticulated" statute governing employee benefits, the product of a decade of congressional study of the Nation's private employee benefit system. *E.g., Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993); *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361 (1980). Like the references to the 1972 Amendments at issue in *Milwaukee II*, no reference to ERISA is complete without noting its comprehensive nature. *Cf., Milwaukee II*, 451 U.S. at 317-19, *with, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). ERISA's legislative history does have a command to create federal common law in certain instances to fill in its interstices, but it is to be the federal common law – not "of the shop" or of § 301 – but of the equitable principles incorporated in ERISA itself. *E.g., Varity Corp. v. Howe*, 116 S.Ct. 1065, 1070 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-15 (1989); *cf. Mertens v. Hewitt Associates*, 508 U.S. 248, 259 (1993) (authority to create federal common law is not the authority to revise text of ERISA).

---

[19] *Id.* at 319.

ERISA is also an equitable statute: Its substantive standards abound with the language and terminology of trust law.[20] In addition ERISA – not § 301 – provides extensive statutory protection for those covered by ERISA benefit plans. The KHD Deutz Health Plan's status here as an ERISA "welfare plan" is significant. Unlike § 301, which merely provides a cause of action, ERISA provides extensive statutory protection for those covered by the Health Plan – *none* of which are displaced by § 301. For example, ERISA requires (i) the Health Plan to meet extensive structural, reporting, and disclosure requirements,[21] (ii) places fiduciary duties on a wide range of Health Plan actors,[22] and (iii) obligates KHD Deutz as

---

[20] *E.g., Firestone*, 489 U.S. at 110-15 .

[21] ERISA's requirements include that the "plan shall be maintained and established pursuant to a written instrument" that "shall provide for one or more named fiduciaries . . . to control and manage the operation and administration of the plan." § 402(a), 29 U.S.C. § 1102(a). In addition, ERISA also imposes extensive reporting and disclosure requirements. For instance, KHD Deutz as the plan administrator must file an annual report and other information with the Department of Labor. §§ 101, 103-04, 29 U.S.C. §§ 1021, 1023-24. Further, KHD Deutz must provide participants and their beneficiaries, *inter alia*, summary annual reports, §§ 102(a)(2), 104(b)(3), 29 U.S.C. §§ 1021(a)(2), 1024(b)(3), and summary plan descriptions, § 102, 29 U.S.C. § 1022, and must also provide information upon written request or upon the happening of a "qualifying event" under the Consolidated Omnibus Budget Reconciliation Act of 1985 amendments to ERISA ("COBRA Amendments"). §§ 104(b)(4), 606(a)(4), 29 U.S.C. §§ 1024(b)(4), 1166(a)(4).

[22] ERISA places fiduciary duties on anyone who "exercises any discretionary authority or discretionary control respecting management of such plan" or "has any discretionary authority or discretionary responsibility in the administration of such

plan sponsor to offer continuation health coverage upon the happening of a "qualifying event."[23]

Finally, and perhaps most important, ERISA's "interlocking, interrelated, and interdependent remedial scheme, which in turn is part of a 'comprehensive and reticulated statute,' "[24] is considered to be both exclusive – and equitable.[25] As this Court set forth in *Pilot Life*:

---

plan." § 3(21)(A), 29 U.S.C. § 1002(21)(A). With respect to the plan, such fiduciaries are held to the "prudent man" standard of care and are obligated to discharge their duties "for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan." § 404(a)(1), 29 U.S.C. § 1104(a)(1). Fiduciaries may also become liable for breaches of co-fiduciaries, *see* § 405, 29 U.S.C. § 1105, and are prohibited from engaging in or authorizing a broad range of "prohibited transactions." *See* § 406, 29 U.S.C. § 1106.

[23] To give one example, a former employee's dependent child who loses plan coverage because of age is entitled to identical coverage at cost for up to 36 months. §§ 602(1) & (2)(A)(iv), 603(5), 29 U.S.C. §§ 1162(1) and (2)(A)(iv), 1163(5). Likewise, a former employee's spouse who loses coverage because of the death of or divorce from the former employee is also entitled to such coverage for up to 36 months. §§ 602(1) & (2)(A)(iv), 603(1)(3), 29 U.S.C. §§ 1162(1) & (2)(A)(iv), 1163(1)(3). Further, KHD Deutz must provide notice of these continuation options, *see* § 606, 29 U.S.C. § 1166, and must grant the spouse or dependents a 60 day election period and a 45 day grace period in which to pay the first premium. *See* §§ 602(3), 605, 29 U.S.C. §§ 1162(3), 1165.

[24] *Russell*, 473 U.S. at 146 (1985) (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)).

[25] *E.g., Mertens*, 508 U.S. at 251-53 (relief under § 502(a)(3) of ERISA is equitable); *Varity Corp.*, 116 S.Ct. at 1077-79 (noting same); *Russell*, 473 U.S. at 139-144 (§ 409 and § 502(a)(2) of ERISA does not authorize non-equitable relief) and 145-46

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.[26]

d. Pursuant to the principles set forth above, a § 301 claim on an ERISA benefit plan assumes the equitable nature of an ERISA claim on that same plan. Under one approach, the "federal common law" of § 301 is simply displaced by the comprehensive equitable statutory enforcement scheme of ERISA. While § 301 remains as a statutory jurisdictional device, the judge-made common law overlay of that § 301 claim is displaced pursuant to the principles set forth by this Court in *Milwaukee II*.[27]

(noting right to "legal" relief was deleted in passage of ERISA); *Calamia v. Spivey*, 632 F.2d 1235, 1236-37 (5th Cir. 1980) (§ 502 only provides for equitable relief); *Daniel v. Eaton Corp.*, 839 F.2d 263, 268 (6th Cir.) (same), *cert. denied*, 488 U.S. 826 (1988); *Wardle v. Central States, Southeast & Southwest Area Pension Fund*, 627 F.2d 820, 829 (7th Cir. 1980) (same), *cert. denied*, 449 U.S. 1112 (1981); *Spinelli v. Gaughan*, 12 F.3d 853, 857 (9th Cir. 1993) (same). For cases holding claims for benefits under § 502(a)(1)(B) provide only for equitable relief, *see, e.g., Pane v. RCA Corp.*, 868 F.2d 631, 635-36 (3rd Cir. 1989) (collecting cases); *Wardle*, 627 F.2d at 829-30; *Kirk v. Provident Life & Accident Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991); *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th Cir. 1990).

[26] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *see also, e.g., Russell*, 473 U.S. at 146-48 (1985).

[27] Such an approach is consistent with ERISA's federal "savings" provision, § 514(d), 29 U.S.C. § 1144(d). Section 514 distinguishes between state "laws and decisions," which are preempted in § 514(c), and federal "laws," which are saved pursuant to § 514(d). Accordingly, reading § 514's provisions *in*

Under another approach, the "federal common law" of § 301 simply becomes the equitable actions set forth in ERISA. *Lincoln Mill's* command to create the federal common law of § 301 from "the policy of our national labor laws" is, in the context of a claim for ERISA benefits on an ERISA benefit plan, a command to follow ERISA – "our national labor policy" on employee benefits.[28] Whichever approach is used, the result remains the same: A claim for benefits on an ERISA benefit plan is an equitable action. And whichever approach is used, the Eleventh Circuit erred when it concluded ERISA was irrelevant to classifying the § 301 claim as a "contract" claim.

e. Finally, allowing the "federal common law" of § 301 to provide additional rights on ERISA benefit plans would upset the carefully crafted and comprehensive remedial scheme set forth in ERISA. In the instant case, § 301 is construed as providing jury rights. As noted above, though, judges are better equipped than juries to

---

pari materia indicates that the failure to include "decisions" in § 514(d) means § 514(d) does not apply to save judicial decisions embodied in "federal common law."

[28] Such an approach may also be consistent with ERISA's federal "savings" provision, § 514(d). If § 514(d) were construed to reach judicial decisions, *compare supra, note* 27, then *Lincoln Mill's* command that § 301's federal common law must be fashioned from "the policy of our national labor policy," carries forward with full force to adopt ERISA as our national labor policy for employee benefits. Moreover, § 514(d) should not be construed to authorize the general grant under § 301 to create "federal common law" to trump the specific statutory provisions and standards set forth in ERISA. *Cf. Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 374-76 (1990).

undertake the complex textual exegesis necessary to reach correct results – especially when such exegesis must be undertaken in light of the complex statutory provisions and competing policy preferences reflected in ERISA. *Cf., Markman,* 116 S. Ct. at 1395-96. Perhaps equally important, the logic underlying this reasoning, that § 301 "means something more" for benefit claims on ERISA plans, would work great mischief. Different substantive standards and different, possible inconsistent, and likely more onerous remedies are inevitable, with the attendant loss in uniformity and increase in plan costs that ERISA was intended to eliminate. *Cf., e.g., Pilot Life,* 481 U.S. at 54; *Russell,* 473 U.S. at 147-48 & n.17

IV. EVEN IF THE § 301 CLAIM WERE CONSTRUED AS A "CONTRACT" CLAIM, THE TYPE OF CONTRACT CLAIM AT ISSUE HERE IS, AS THE SIXTH CIRCUIT RECOGNIZED AND THE ELEVENTH CIRCUIT APPARENTLY REJECTED, ONE FOR "SPECIFIC PERFORMANCE," AN EQUITABLE ACTION.

a. If Respondents' § 301 claim is viewed as a contract action, it is one for specific performance. Had this action been brought at the time of the adoption of the Seventh Amendment, it would have been tried in a court of equity. Any attempt to convert this equitable action into a legal one through procedural advantages or otherwise would, accordingly, violate the Seventh Amendment's explicit command that the right to jury trial be "preserved" – not expanded, modified, enlarged, reconfigured, or otherwise changed.

b. The Seventh Amendment merely requires that the right to a jury trial be "preserved." Accordingly, the two-part "issues-remedies" test used to determine whether statutory actions provide for jury trials is merely the means to resolve the ultimate question: Whether the action at issue would have been tried in courts of law or courts of equity at the time of the adoption of the Seventh Amendment. *E.g., Tull v. United States*, 481 U.S. 412, 417-18, 421 & n.6. (1987); *Terry*, 494 U.S. at 591-92 (Kennedy, J., joined by O'Connor and Scalia, JJ., dissenting); *Ross v. Bernhard*, 396 U.S. 531, 543-51 (1970) (Stewart, J., joined by Burger, CJ., and Harlan, J., dissenting).

b. Here, there is no need to search for a historical "analogue" – the § 301 claim at issue here, if it were considered to be a contract claim, would have been one for specific performance, as it seeks a court order compelling KHD Deutz to perform the contract.[29] An action for specific performance was an equitable action at the time of the adoption of the Seventh Amendment. *E.g., Hepburn & Dundas's Heirs v. Dunlop & Co.*, 14 U.S. (1 Wheat) 179, 203 (1816); *Morgan's Heirs v. Morgan*, 15 U.S. (2 Wheat) 290, 302 (1817). In a specific performance action, an equity court historically had power to provide compensation for losses occasioned by the delay until the injunction was issued.[30] Respondents, who were masters of

---

[29] *See, e.g.*, DAN DOBBS, LAW OF REMEDIES, at § 12.8(1), p. 805 (West 1993) (specific performance is a "court order compelling the defendant to perform the contract."); RESTATEMENT (SECOND) OF CONTRACTS at § 357 & comm. a. (1981) (same).

[30] *See, e.g., County of Mobile v. Kimball*, 102 U.S. 691, 707 (1881) (equitable action for specific performance encompasses award for damages caused by delay); *Chicago M & St. P. Ry. v.*

their complaint, chose to bring precisely this type of equitable action under § 301: A request for specific performance of the benefit plan consisting of an injunction to follow the alleged plan terms and monetary relief to compensate them for any medical expenses incurred between the time of the alleged unlawful changes and the issuance of an injunction. As noted, in their § 301 claim in "Count I," Respondents alleged:

> 16. As a result of the Company's actions, plaintiffs will suffer irreparable injury.
>
> 17. Plaintiffs have no adequate remedy at law to redress the injury they will suffer on account of the Company's actions.

Pet. App. at App. 39. In their prayer for relief, Respondents requested in pertinent part:

> (1) That pending the filing of an answer and the hearing and determination of this action, the Court grant plaintiffs a preliminary injunction, enjoining defendant from decreasing benefits provided to retirees . . . ; that the Court enjoin defendants from increasing the deductible, copayment and maximum out-of-pocket amount paid by retirees . . . ; and that the Court enjoin defendant from charging retirees a monthly premium for benefits. . . .

United States, 218 F. 288, 302 (9th Cir. 1914) (equitable action for specific performance includes award for damages), *aff'd*, 244 U.S. 351 (1917); *see generally*, EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE & INJUNCTIONS at § 21.2.1.1, pp. 47-72 (Little Brown 1989) (collecting English cases at turn of 18th-century); RESTATEMENT OF CONTRACTS at § 365 & comm. d. (1932) & RESTATEMENT (SECOND) OF CONTRACTS at § 358(3) & comm. c. (1981).

. . . .

> (3) *That the Court order the Company to perform its contractual obligations to all class members under the 1984 and 1986 Insurance Agreements;*
>
> . . . .
>
> (6) That the Court award monetary damages to restore all affected class members to the position in which they would have been but for the defendant's contractual and statutory violations.

Pet. App. at App. 44-46 (emphasis added). Accordingly, had this action been filed at the time of the adoption of the Seventh Amendment, it would have been an equitable action for specific performance tried in a court of equity.

c. In *Kelsey-Hayes*, the Sixth Circuit applied the foregoing principles to conclude the monetary relief for delay in a specific performance action is "incidental to or intertwined with injunctive relief," and thus there is no right to a jury trial on such a § 301 claim.[31] Despite having its

---

[31] *Kelsey-Hayes*, 73 F.3d at 660-61. In cases decided from 1959 onward this Court has consistently concluded the right to a jury trial should not be lost by characterizing a legal claim as "incidental to" an equitable claim. *E.g.*, *Beacon Theaters v. Westover*, 359 U.S. 500 (1959); *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974); *Tull v. United States*, 481 U.S. 412, 425 (1987). In a case decided after these precedents, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990), this Court, however, observed that monetary relief is *not* necessarily legal relief. Rather, this Court recognized at least two exceptions:

> First, we have characterized damages as equitable where they are restitutionary, such as in "action(s) for disgorgement of improper profits." . . . Second, a

attention called to the *Kelsey-Hayes* decision in a "28(j) letter" and the Petition for Rehearing, the Eleventh Circuit ignored *Kelsey-Hayes* in its published opinion. Like two ships passing in the night, the circuit conflict engendered by *Kelsey-Hayes* and the opinion in the instant case confuses federal constitutional and procedural law without any recognition they exist. The means for resolution should appropriately come from this Court.

d. This Court should also grant the Petition because expanding the right to a jury under these circumstances would violate (i) the Seventh Amendment's command that the right to a jury trial "shall be preserved" and, (ii) to the extent the expansion here is rested on the procedural rules merging law and equity, such expansion would also violate the Rules Enabling Act's specific statutory command that such rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b); *see also, Ross*, 396 U.S. at 546-50 (Stewart, J., joined by Burger, CJ. and Harlan, J., dissenting) (noting merger could not convert an equitable action into a legal one). Simply put, this action, had it been tried at the time of the adoption of the Seventh Amendment, would have been tried in a court of equity. Any attempt to turn it into a "legal action" through the procedural advantages offered by the merger of law and equity violates the command that the

---

monetary award "incidental to or intertwined with injunctive relief" may be equitable.

Terry, 494 U.S. at 570-71. The Sixth Circuit in *Kelsey-Hayes* was applying the "incidental to or intertwined with" exception according to the latter, permissible use recognized in *Terry*.

right to jury trial simply be "preserved" and the prohibition against allowing procedural rules to enlarge or modify substantive rights.

e. Finally, the instant Petition offers a factually pristine vehicle[32] to correct a mischievous interpretation that has crept into Seventh Amendment law since *Ross v. Bernhard* – i.e., that legal issues may somehow be parsed from a concededly equitable action to justify a right to a jury trial. This interpretation can be corrected by, as the Sixth Circuit did, given content to the "incidental to or intertwined with" exception recognized in *Terry* according to the historical dictates and practices required by the plain language of the Seventh Amendment.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD SHAPIRO
Counsel of Record
McCALLA, THOMPSON, PYBURN,
HYMOWITZ & SHAPIRO
650 Poydras Street
Suite 2800
New Orleans, Louisiana 70130
(504) 524-2499
Attorney for Petitioner

[32] This Petition arises from a § 1292(b) certification on the jury issue and the remedies being sought on the § 301 claim are undisputed.

APPENDIX 1

Ronald STEWART, David Kirchoff, Darrell L. Howard, Louis Kubitschek, John Tuckness, Ronald Keltner, on behalf of themselves and other persons similarly situated, Plaintiffs-Appellants,

v.

KHD DEUTZ OF AMERICA CORPORATION, Defendant-Appellee.

No. 94-8547.

United States Court of Appeals,
Eleventh Circuit.

Feb. 28, 1996.

Retirees brought class action against employer under the Employee Retirement Income Security Act of 1974 (ERISA) and § 301 of the Labor Management Relations Act (LMRA), alleging that employer breached collective bargaining agreements in failing to provide health benefit coverage specified in the agreements for duration of their retirement. On remand, 980 F.2d 698, the United States District Court for the Northern District of Georgia, No. 1:91-CV-1534, Marvin H. Shoob, J., granted employer's motion to strike retirees' jury demand. Jury issue was certified for interlocutory review. The Court of Appeals, Hatchett, Circuit Judge, held, as an apparent matter of first impression, that: (1) retirees had Seventh Amendment right to jury trial on their claim under § 301 of the LMRA, and (2) joinder of ERISA claim to retirees' LMRA claim did not deprive retirees of their right to jury trial.

Reversed.

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT, DUBINA and BLACK, Circuit Judges.

HATCHETT, Circuit Judge:

As a matter of first impression in this circuit, the court holds that a jury trial is available to plaintiffs in a breach of contract lawsuit brought under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and when a hybrid LMRA and Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1104(a), 1132(a)(1)(B), and § 1132(a)(3)), lawsuit is brought.

FACTS

In May 1985, appellee, KHD Deutz of America Corporation (KHD Deutz), purchased a combine manufacturing plant in Independence, Missouri, from Allis-Chalmers Manufacturing Company (Allis-Chalmers). KHD Deutz, through its wholly-owned subsidiary Deutz-Allis Corporation (Deutz-Allis), assumed the 1984 collective bargaining agreement (CBA) between Allis-Chalmers and Local 1958 of the United Steelworkers of America (Local 1958). In 1986, KHD Deutz and Local 1958 negotiated a new CBA almost identical to the 1984 CBA. Both CBAs provided health benefits to employees retiring on or after May 25, 1985.

In June 1990, KHD Deutz sold Deutz-Allis and its Independence plant. Pursuant to the terms of the sales agreement, KHD Deutz retained responsibility for all health benefit programs for employees who retired

between May 25, 1985, and December 31, 1989. On June 1, 1991, KHD Deutz unilaterally modified its retirees' health benefit program to provide for monthly premiums, increased deductibles, and reduced maximum lifetime benefits.

PROCEDURAL HISTORY

On July 3, 1991, retired employees Ronald Stewart, David Kirchoff, Darrell L. Howard, Lewis Kubitschek, John Tuckness, and Ronald Keltner (the retirees) brought a class action lawsuit in the Northern District of Georgia alleging that KHD Deutz breached the 1984 and 1986 CBAs in failing to provide the health benefit coverage specified in the CBAs for the duration of their retirement. In their complaint, the retirees presented a legal claim for breach of contract and sought legal and equitable relief under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and sections 404(a), 502(a)(1)(B), and 502(a)(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1104(a), 1132(a)(1)(B), and 1132(a)(3). In the alternative, the retirees alleged that KHD Deutz should be equitably estopped from reducing their benefits because the company intentionally induced, directed, and caused the fiduciary to engage in breaches of fiduciary duty.

On July 5, 1991, the retirees filed a motion for a preliminary injunction to prevent KHD Deutz from modifying their health benefits. On December 16, 1991, the district court denied the preliminary injunction finding that the language of the CBAs unambiguously established KHD Deutz's right to modify the health benefits, and thus precluded the court from considering extrinsic

evidence on the issue. The retirees appealed the denial of their preliminary injunction motion to this court. On January 5, 1993, this court reversed the district court and directed it to consider the extrinsic evidence the parties offered. *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 704 (11th Cir.1993). On remand, the retirees renewed their motion for preliminary injunction, and KHD Deutz filed a motion to strike the jury demand.

On January 13, 1994, the district court denied the retirees' renewed motion for preliminary injunction and granted KHD Deutz's motion to strike the jury demand. In striking the jury demand, the district court held that the retirees could not recover extracontractual damages under section 301. On March 7, 1994, after the retirees filed a motion to certify the jury trial issue for appeal, the court granted the retirees' motion and certified the jury issue for interlocutory review. The district court certified the issue pursuant to 28 U.S.C. § 1292(b) as follows:

> whether plaintiffs are entitled to a jury trial of their breach of contract claims under section 301 of the Labor Management Relations Act where those claims are joined with claims under the Employment Retirement Income Security Act of 1974 which are not triable to a jury in an action to restore retiree health benefits and recover damages for breach of contract.[1]

---

[1] Initially, this appeal was consolidated with the appeal from the district court's denial of the retirees' renewed motion for a preliminary injunction. The retirees, however, voluntarily dismissed their appeal on the denial of the renewed motion for preliminary injunction; therefore, that issue is not presently before this court.

CONTENTIONS

The retirees contend that the district court erred in striking their demand for a jury trial on their breach of contract claim under section 301 of the LMRA because that claim and the remedy sought are both legal in nature; thus, the Seventh Amendment entitles them to a jury trial. The retirees also contend that their right to a jury trial on the section 301 claim remains intact even though it is joined with ERISA claims that do not ordinarily afford the right to a jury trial.

In response, KHD Deutz contends that the district court properly granted its motion to strike the retirees' demand for a jury trial because the remedies sought under section 301 of the LMRA and section 502 of ERISA are equitable in nature; therefore, no Seventh Amendment right to a jury trial exists on the retirees' section 301 claim. In the alternative, KHD Deutz contends that even if the monetary relief sought under section 301 is construed as legal in nature, the remedy is properly characterized as incidental to, or intertwined with, ERISA, and therefore does not entitle the retirees to a jury trial.[2]

ISSUES

This interlocutory appeal presents the following issues: (1) whether the retirees are entitled to a jury trial

---

[2] KHD Deutz also argues that this court should dismiss this appeal because it was initially granted in connection with the retirees' appeal of the denial of their renewed motion for preliminary injunction. We reject this contention.

on their breach of collective bargaining claim under section 301 of the LMRA; and (2) if so, whether the retirees retain their Seventh Amendment right to a jury trial in a hybrid LMRA/ERISA action where the amount of monetary relief sought under LMRA and ERISA is identical.

DISCUSSION

A. Right to jury trial under section 301 of LMRA

This court reviews a district court's grant of a motion to strike a jury demand in plenary fashion. *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152, 155 (11th Cir.1994). Because this court has not specifically addressed whether the Seventh Amendment provides a right to a jury trial in a section 301 LMRA action, we first address this issue.

In determining whether the retirees are entitled to a jury trial on the section 301 claim, we first interpret the statute. *Waldrop*, 24 F.3d at 155. Section 301 of the LMRA provides for lawsuits by and against labor unions, stating in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C.A. § 185(a) (West 1978). Because section 301 does not provide a statutory right to a jury trial, we must now determine whether a jury trial is required under the Seventh Amendment. *Waldrop*, 24 F.3d at 155.

The Seventh Amendment secures the right to a jury trial "[i]n suits at common law[ ] where the value in controversy shall exceed twenty dollars." *Waldrop*, 24 F.3d at 156. Although at the time of its adoption the Seventh Amendment only preserved the right of jury trial for common law actions existing in 1791, courts have interpreted the amendment to extend to "all suits where legal rights are involved whether at common law or arising under federal legislation." *Waldrop*, 24 F.3d at 156; *see also Curtis v. Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 1007, 39 L.Ed.2d 260 (1974).

We employ a two-part inquiry to determine the availability of a jury trial under the Seventh Amendment when a federal statute does not explicitly provide for a jury trial. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S.Ct. 1339, 1344, 108 L.Ed.2d 519 (1990). First, we compare the nature of the issues to be resolved to "[eighteenth century] actions brought in the courts of England prior to the merger of the courts of law and equity." *Tull v. United States*, 481 U.S. 412, 417-18, 107 S.Ct. 1831, 1835-36, 95 L.Ed.2d 365 (1987). Second, we assess whether the remedy sought is legal or equitable in nature. *Tull*, 481 U.S. at 418, 107 S.Ct. at 1836. The nature of the remedy sought is the more important inquiry in our analysis. *Terry*, 494 U.S. at 565, 110 S.Ct. at 1344.

An action for breach of a CBA did not exist under common law. *Terry*, 494 U.S. at 565-66, 110 S.Ct. at 1344-45. Therefore, to satisfy the first inquiry we look for an analogous cause of action that existed in eighteenth century England. The retirees contend that their action for breach of the CBAs most resembles a breach of contract action. In support of their characterization, the retirees note that section 301 explicitly provides for "suits

for violation of contracts." 29 U.S.C. § 185(a). KHD Deutz argues that this cause of action more closely mirrors a trust beneficiary's equitable action because ERISA, like a trust, places fiduciary duties on employers in the implementation of ERISA-regulated plans.

We agree with the retirees' characterization of this action. The dispositive issue is whether KHD Deutz breached the CBAs. KHD Duetz urges this court to analyze the issues to be resolved under the retirees' 301 claim in light of retirees' ERISA claims. The retirees' section 301 claim, however, is actionable independent of ERISA. *See Ross v. Bernhard*, 396 U.S. 531, 537, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970) (the Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action). Thus, for purposes of Seventh Amendment analysis, ERISA is irrelevant. KHD Deutz also argues that the retirees' characterization of the issues in this LMRA/ERISA action constitutes conclusory labeling. Although the Supreme Court has stated that for Seventh Amendment analysis the nature of the remedy is more dispositive than the nature of the issues to be tried, the first inquiry is nonetheless essential because the Seventh Amendment only extends to cases in which legal rights are at stake.[3] *See*

---

[3] The Seventh Amendment right to a jury, however, may also attach to a cause of action that encompasses both legal and equitable issues. *See Terry*, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (holding that an action for breach of fair representation under section 301 of LMRA was legal in nature despite the fact that the issue when viewed in isolation, was analogous to a claim against the trustee for breach of fiduciary duty – an equitable action).

Granfinancier v. Nordberg, 492 U.S. 33, 44, 109 S.Ct. 2782, 2791, 106 L.Ed.2d 26 (1989); *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th Cir.1990). We hold that the retirees' breach of CBA claim is most analogous to a claim of breach of contract – a legal cause of action. *See Terry*, 494 U.S. at 570, 110 S.Ct. at 1347 (holding that a breach of a collective bargaining agreement is most analogous to a "breach of contract claim"). Thus, we conclude that the issues to be resolved under the section 301 claim, when viewed in isolation of the ERISA claims, are legal in nature.

The second inquiry requires this court to examine whether the remedy sought is legal or equitable in nature. The only remedy the retirees seek under section 301 of LMRA is compensatory damages representing out-of-pocket expenditures incurred as a result of the decreased health benefits.[4] An action for money damages was "the traditional form of relief offered in courts of law." *Curtis v. Loether*, 415 U.S. 189, 196, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260 (1994); *Terry*, 494 U.S. at 570, 110 S.Ct. at 1347. Monetary relief, however, is only presumed to be a legal remedy. A monetary award may be characterized as an equitable remedy if it is found to be "incidental to or intertwined with injunctive relief." *Terry*, 494 U.S. at 571, 110 S.Ct. at 1348.

KHD Deutz argues that the monetary relief the retirees seek under section 301 is equitable in nature

---

[4] Retirees concede that the same remedy is sought under both ERISA and LMRA; however, they argue that for purposes of Seventh Amendment analysis, the remedy is characterized differently under LMRA.

because the 301 action involves an ERISA-regulated plan.[5] In support of its proposition, KHD Deutz cites *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525 (11th Cir.1990). In *Blake* this court held that monetary relief sought under section 502 of ERISA was equitable in nature; therefore, no Seventh Amendment right to a jury trial existed. The plaintiffs in *Blake* sought monetary damages under ERISA for medical expenses incurred and claimed that they were entitled to a jury trial. The plaintiffs in *Blake* argued that the monetary damages under ERISA was more analogous to a monetary award in a breach of contract action than injunctive relief. The court in *Blake* rejected plaintiffs' argument and held that the monetary relief sought was equitable. In reaching its holding the court stated:

> Although the plaintiffs assert that they are claiming money damages, in effect they are claiming the benefits they are allegedly entitled

---

[5] The argument KHD Deutz makes here is similar to an argument the Supreme Court rejected in *Terry*. In *Terry*, the defendant argued that the monetary damages plaintiffs sought were equitable because the court characterized back pay awarded under Title VII of the Civil Rights Act of 1964 as equitable. *Terry*, 494 U.S. at 571, 110 S.Ct. at 1348. After noting that Congress specifically characterized back pay under Title VII as a form of equitable relief and finding no such congressional declaration under the National Labor Relations Act (NLRA), the Court refused to find a parallel between Title VII back pay – an equitable remedy – and back pay sought in a section 301 LMRA action. *Terry*, 494 U.S. at 573, 110 S.Ct. at 1349. Similarly, this court declines to find a parallel connection between money damages sought under ERISA, an equitable statute, and monetary damages sought in a cause of action under section 301 of LMRA that is legal in nature.

> to under the plan. Although here the medical treatment has been completed so that a money judgment would satisfy their demands, if the claimants were still under treatment, only an order for continuing benefits would be sufficient.

Blake, 906 F.2d at 1526. Accordingly, the court in *Blake* affirmed the district court's decision striking plaintiffs' jury demand.

In this case, KHD Deutz's reliance on *Blake* is misplaced. For purposes of Seventh Amendment analysis, ERISA has been interpreted as an equitable statute. *See Chilton v. Savannah Foods & Industries, Inc.*, 814 F.2d 620, 623 (11th Cir.1987); *Blake*, 906 F.2d at 1526. Accordingly, no Seventh Amendment right to a jury trial exists in actions brought pursuant to ERISA. *Chilton*, 814 F.2d at 623. Unlike ERISA, this court has not interpreted section 301 to be equitable in nature. *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir.1988). Therefore, the classification of monetary damages under ERISA is not determinative. Because we find no reason to depart from the general rule that monetary relief sought pursuant to section 301 of the LMRA is legal in nature, we conclude that the retirees have a Seventh Amendment right to a jury trial on their section 301 claim.

B. Right to jury trial under hybrid LMRA/ERISA action

The central issue in this case is whether the joinder of a section 301 LMRA claim with ERISA claims deprives the retirees of their constitutional right to a jury trial. The Supreme Court has repeatedly stressed that the Seventh

Amendment right to a jury trial is not abridged when equitable and legal claims are joined in the same action. *See Ross*, 396 U.S. at 537-38, 90 S.Ct. at 737-38 ("where equitable and legal claims are joined in the same action, there is a right to a jury trial on legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims"); *Tull*, 481 U.S. at 425, 107 S.Ct. at 1839 (same); *Loether*, 415 U.S. at 196 n. 11, 94 S.Ct. at 1009 n. 11 (same).

Although the issue of whether plaintiffs retain their Seventh Amendment right to a jury trial in a hybrid LMRA/ERISA action is a matter of first impression in this circuit, other courts have considered the question and held the right to a jury trial exists in such cases. *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 813-14 (7th Cir.1992), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 2992, 125 L.Ed.2d 687 (1993); Local 836, *United Automobile Workers v. Echlin, Inc.*, 670 F.Supp. 697 (E.D.Mich.1987); *International Union, United Automobile Workers v. Park-Ohio Industries*, 661 F.Supp. 1281 (N.D.Ohio 1987), *aff'd in part, rev'd in part on other grounds*, 876 F.2d 894 (6th Cir.1989); *Smith v. ABS Industries, Inc.*, 653 F.Supp. 94 (N.D.Ohio 1986). For example, the Seventh Circuit in *Senn* held that plaintiffs were entitled to a jury trial in a hybrid LMRA/ERISA action. *Senn*, 951 F.2d 806. In *Senn* the plaintiffs asserted a claim for breach of contract and sought compensatory and injunctive relief pursuant to section 301 of the LMRA and sections 404(a)(1), 502(a)(1)(B), and 502(a)(3) of ERISA. In that case, the plaintiffs requested a jury trial on their section 301 claim; the trial court granted plaintiffs' request, and the defendant appealed. The court in *Senn*

held that the Seventh Amendment provided plaintiffs with the right to a jury trial because plaintiffs instituted a legal claim for breach of contract and sought legal relief in the form of compensatory damages pursuant to section 301 in addition to their ERISA claims. *Senn*, 951 F.2d at 813-14. Accordingly, the *Senn* court affirmed the district court's decision denying defendant's motion to strike jury demand.

In an attempt to distinguish *Senn* from this case, KHD Deutz argues that the retirees seek extracontractual damages. This argument is without merit. As previously noted, the monetary relief the retirees seek under section 301 and ERISA is identical. Moreover, if the retirees sought extracontractual damages under section 301 of the LMRA in a LMRA/ERISA action, their 301 claim would be barred. *See Connors*, 855 F.2d 1499 (holding that extracontractual damages under section 301 of the LMRA is not recoverable in a hybrid LMRA/ERISA action).[6] In the alternative, KHD Deutz argues that the comprehensive scheme of ERISA warrants the denial of the retirees' right to a jury trial on their section 301 claim in this action. We

---

[6] In *Connors*, plaintiff sought extracontractual compensatory damages under both section 502 of ERISA and section 301 of LMRA. After concluding that extracontractual damages were not available under ERISA, the court in *Connors* held that extracontractual damages were also not available under LMRA. *Connors*, 855 F.2d at 1509. The court reasoned that to allow extracontractual damages under section 301 would frustrate ERISA. *Connors*, 855 F.2d at 1509. Because retirees do not seek damages above and beyond damages provided for under ERISA, *Connors* does not control the issue of whether a jury trial is permissible on a section 301 claim in a hybrid LMRA/ERISA action.

also reject this argument. First, section 514(d) of ERISA explicitly saves federal causes of action including section 301 of the LMRA.[7] 29 U.S.C. § 1144(d). Second, permitting the retirees to exercise their constitutional right to a jury trial is "consistent with the spirit of the Federal Rules of Civil Procedure, which allow liberal joinder of legal and equitable actions, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1982 ed.), which preserves the right to jury trial to both parties." *Terry*, 494 U.S. at 589, 110 S.Ct. at 1357 (Kennedy, J., dissenting). Finally, and more importantly, the Seventh Amendment right to a jury trial should be abridged, if at all, "only under the most imperative circumstances"; circumstances which do not exist in this case. *See Dairy Queen Inc. v. Wood*, 369 U.S. 469, 472-73, 82 S.Ct. 894, 897-98, 8 L.Ed.2d 44 (1962) (" 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through . . . determination of equitable claims.' ") (quoting *Beacon Theatres v. Westover*, 359 U.S. 500, 510-11, 79 S.Ct. 948, 956-57, 3 L.Ed.2d 988 (1959)).

For the reasons set forth above, we join the Seventh Circuit in holding that plaintiffs are entitled to a jury trial in hybrid LMRA/ERISA actions. Accordingly, the district court is reversed, and the case is remanded to the district

---

[7] Section 514(d) of ERISA provides: "[n]othing in this [statute] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C.A. § 1144(d) (West 1985).

court with directions that it proceed consistent with this opinion.

REVERSED.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD STEWART, DAVID KIRCHHOFF, DARRELL L. HOWARD, LOUIS KUBITSCHEK, JOHN TUCKNESS and RONALD KELTNER, on behalf of themselves and other persons similarly situated,	:	CIVIL ACTION
Plaintiffs,	:	1:91-cv-1534-MHS
v.	:	
KHD DEUTZ OF AMERICA CORP.,	:	
Defendant	:	

ORDER

(Filed Jan. 14, 1994)

This action is before the Court on defendant's second motion to transfer venue; defendant's motion to strike plaintiffs' claims for compensatory, emotional distress, and exemplary damages ("extra-contractual damages") and to strike plaintiffs' demand for a jury trial; and plaintiffs' supplemental motion for preliminary injunction. For the reasons stated below, the Court denies defendant's motion to transfer, grants defendant's motion to strike plaintiffs' claims for extra-contractual damages and demand for a jury trial, and denies plaintiffs' motion for a preliminary injunction.

Plaintiffs are former employees of a combine manufacturing plant in Independence, Missouri. Defendant, who is headquartered in Norcross, Georgia, owned the plant from May 26, 1985, until January 1, 1990. Plaintiffs retired from their employment from May 26, 1985, to December 31, 1989. Prior to and during this period, the employees of the plant were represented by Local 1958 of the United Steelworkers of America ("USWA"). When defendant purchased the manufacturing plant, it adopted a 1984 collective bargaining agreement ("CBA") between the USWA and the prior owner. A health benefit agreement was attached to and incorporated by the 1984 CBA. In 1986 defendant negotiated a new CBA with the USWA that also incorporated a health benefit agreement identical in all relevant respects to the 1984 agreement. After extension, the 1986 CBA expired at the end of May 1990.

Defendant sold the manufacturing plant in June 1990 but retained responsibility for the health benefits of employees who retired between May 25, 1985, and January 1, 1990. Defendant modified the health and welfare benefits of these retirees, effective June 1, 1991. Plaintiffs are challenging these modifications. At issue in this action is whether certain health and welfare benefits provided to the plaintiffs are vested, lifetime benefits that cannot be altered by defendant.

I. Defendant's Motion to Transfer Venue

Defendant filed its first motion to transfer venue from the Northern District of Georgia to the Western District of Missouri on July 26, 1991. Judge Evans denied defendant's motion in her Order of December 16, 1991.

Defendant filed this second motion, claiming that new case developments warrant a transfer.[1] First, defendant alleges that three of the named plaintiffs who reside in Missouri cannot travel from Missouri to Atlanta for their depositions because of health-related problems; therefore, they are presumably unable to travel to Atlanta for trial. Second, defendant claims that it has obtained through discovery a letter which demonstrates blatant forum shopping by the plaintiffs.

Under 28 U.S.C. § 1404(a), the Court may order transfer of a case from a district in which venue is appropriate to a district in which the matter could have been brought[2] "for the convenience of the parties and witnesses, in the interest of justice." The decision to transfer venue under 28 U.S.C. § 1404(a) depends on a balancing of all relevant factors to determine whether the litigation would more conveniently proceed and the interests of justice be better served by transfer. Charles A. Wright et al., 15 *Federal Practice and Procedure* § 3847 (1976). "The federal courts traditionally have accorded a plaintiff's choice of forum considerable deference." *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). Therefore, in the usual motion for transfer under § 1404(a), the burden is on the moving

---

[1] Plaintiffs have filed a motion for leave to file a response to defendant's reply memorandum in support of its motion to transfer venue. For the reasons stated in plaintiffs' motion, the Court grants plaintiffs' motion for leave to file a response.

[2] Plaintiff argues that the Court cannot transfer this action to the Western District of Missouri because this action could not have been brought there. Because the Court has determined that transfer is not appropriate, the Court need not address this issue.

party to establish why there should be a change of venue. *Id.*; *see* Wright, *supra* § 3838; *see Boone v. Sulphur Creek Resort, Inc.*, 749 F. Supp. 195, 201 (S.D. Ind. 1990). Generally, a defendant who moves for a transfer of venue must show that the plaintiff's chosen forum is inconvenient for the defendant and that plaintiff would not be substantially inconvenienced by a transfer. Transfer should not be ordered if the result is merely to shift the inconvenience from one party to the other. Wright, *supra; Van Dusen v. Barrack*, 376 U.S. 612, 646 (1964). It is not sufficient for the defendant to demonstrate only that the plaintiff's choice of forum is inconvenient for the plaintiff. Wright, *supra* § 3849; *Sorrels Steel Co. v. Great Southwest Corp.*, 651 F. Supp. 623, 629 (S.D. Miss. 1986).

After carefully balancing all relevant factors in this action, the Court concludes that the litigation would not more conveniently proceed nor would the interests of justice be better served by transfer. First, defendant argues that plaintiffs' choice of forum is inconvenient for defendant. Specifically, defendant claims that three of the named plaintiffs may be unable to travel from Missouri to Atlanta to testify at trial. Defendant argues that one of these plaintiffs needs to be present at trial because, defendant claims, he is a vital class representative as a result of his involvement with the USWA and his submission of affidavits in this action. In addition, defendant alleges that several persons, who are former employees living in Missouri and not subject to this Court's subpoena power, are needed at trial to give crucial testimony regarding the collective bargaining negotiations. Therefore, defendant

argues, it would be inconvenienced by trial in the Northern District of Georgia but not by trial in the Western District of Missouri.

Plaintiffs counter that defendant have [sic] not demonstrated that defendant would be substantially inconvenienced by trial in the Northern District of Georgia. Plaintiffs argue that many of the witnesses alleged by defendant to be "vital" for trial in this action are not in fact "vital" because they were involved only in later collective bargaining negotiations not relevant to this action.[3]

Moreover, plaintiffs contend that they will be substantially inconvenienced by a transfer of this action.[4] Plaintiffs claim that certain former employees of defendant involved in the relevant collective bargaining agreements or executive decisions concerning such agreements, and whose testimony will therefore be crucial, are located in the Northern District of Georgia or other locations outside of the Western District of Missouri, and would not be subject to the subpoena power of the Western District of Missouri. Plaintiffs also point out

---

[3] Plaintiffs do not respond to defendant's claim that one of the named plaintiffs who may be unavailable for trial is a vital witness. However, defendant has not demonstrated the necessity for the live testimony of this party, nor that he will in fact be unable to attend trial in the Northern District of Georgia.

[4] Defendant makes various arguments that plaintiffs will be inconvenienced by plaintiffs' choice of forum. It is not sufficient for the defendant to show that the plaintiff's chosen forum is inconvenient for plaintiff. Moreover, plaintiffs claim that the forum to which defendant moves that this action be transferred is inconvenient for plaintiffs.

that the majority of relevant documents are located in the Northern District of Georgia at defendant's corporate headquarters.[5]

The Court concludes that even though defendant has demonstrated that the Northern District of Georgia is somewhat more inconvenient for defendant, defendant has failed to show that the Western District of Missouri is not equally or more inconvenient for the plaintiffs. Therefore, a transfer of this action would merely shift the inconvenience from the defendant to the plaintiffs.[6] Thus, the Court determines that defendant has failed to meet its burden of proof and denies defendant's motion to transfer venue.

II. Defendant's Motion to Strike

A. Compensatory, Emotional Distress, and Exemplary Damages

Plaintiffs have requested equitable relief and compensatory, emotional distress, and exemplary damages ("extra-contractual damages"). Plaintiffs' complaint states five causes of action: one under 29 U.S.C. § 185 (Section

---

[5] The location of records and documents should be considered in determining whether transfer is proper. Wright, *supra* § 3853.

[6] Also, for the reasons stated by plaintiffs in their memorandum in opposition to defendant's motion to transfer venue, the Court concludes that defendant has not shown that plaintiff has engaged in "blatant" forum shopping; therefore, the Court does not address how such "blatant" forum shopping should be considered in a decision whether to transfer this action.

310 of the Labor Management Relations Act ("LMRA")); three under 29 U.S.C. § 1001-1168 (the Employee Retirement Income Security Act of 1974 ("ERISA")); and one federal equitable estoppel cause of action which is derivative of the ERISA statutory provisions. Defendant claims that plaintiffs are entitled only to equitable relief, but not to extra-contractual damages, under ERISA or the LMRA.

The Court concludes that extra-contractual damages may not be recovered under the LMRA in this action. The Eleventh Circuit has held that extra-contractual damages cannot be recovered under § 301 of the LMRA in a mixed LMRA\ERISA action. *United Steelworkers of America, etc. v. Connors Steel Co.*, 855 F.2d 1499, 1509-10 (11th Cir. 1988), *cert. denied, H.K. Poter Co. v. United Steelworkers of America., etc.*, 489 U.S. 1096 (1989). Therefore, this Court must grant defendant's motion to strike plaintiffs' claims for extra-contractual damages under the LMRA.

The Court also concludes that extra-contractual damages may not be recovered under ERISA. Section 502 of ERISA authorizes civil enforcement of ERISA and identifies six types of civil actions that may be brought by various parties. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139 (1985). Section 502(a) empowers a participant or beneficiary to recover benefits, to enforce or clarify rights, or to obtain an injunction or other equitable relief.[7]

---

[7] Section 502(a) reads, in relevant part, as follows:

A civil action may be brought –

(1) by a participant or beneficiary –

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under

The Eleventh Circuit has stated that extra-contractual damages cannot be recovered under ERISA § 502(a)(3). *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991). Furthermore, the Supreme Court recently ruled that "equitable relief" under ERISA § 502(a)(3) is limited to a remedy traditionally viewed as "equitable," such as injunction or restitution. Thus, "legal" damages cannot be recovered under this section. *Mertens v. Hewitt Assocs.*, 61 U.S.L.W. 4510, 4512 (1993). Compensatory, emotional distress, and exemplary damages are "legal" damages. Therefore, extra-contractual damages cannot be recovered under ERISA § 502(a)(3).

Plaintiffs argue that extra-contractual damages are available under ERISA § 502(a)(1)(B). However, the Eleventh Circuit has held that ERISA § 501(a)(1) does not create legal rights that would entitle a plaintiff to a jury

---

the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by . . . a participant, beneficiary, . . . for appropriate relief under section 409. . . . "

(3) by a participant, beneficiary, or . . .

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

29 U.S.C. § 1132(a).

To the extent plaintiffs raise a cause of action under ERISA § 409, the availability of extra-contractual damages under this section has been expressly rejected by the Supreme Court in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 139.

trial. *Chilton v. Savannah Foods & Industries, Inc.*, 814 F.2d 620, 623 (11th Cir. 1987). In other words, the remedies available under ERISA § 502(a)(1)(B) are in the nature of equitable relief. In light of the *Mertens* decision in which the Court stated that extra-contractual damages are not equitable relief, the Court concludes that extra-contractual damages also cannot be recovered under ERISA § 502(a)(1)(B).

Because the Court has concluded that extra-contractual damages may not be recovered under the LMRA or under ERISA §§ 502(a)(1)(B), 502(a)(2), or 502(a)(3)(B), the Court grants defendant's motion to strike plaintiffs' claims for compensatory, emotional distress, or exemplary damages.

B. Jury Trial Demand

Defendant also moved to strike plaintiffs' demand for a jury trial. Defendant argues that because plaintiffs can pursue only equitable and restitutionary relief and incidental monetary relief, they are not entitled to a jury trial. Plaintiffs claim, on the other hand, that because they seek some monetary relief, they are seeking legal relief and are entitled, therefore, to a jury trial. Defendant counters that the money damages sought (recoupment of health expenditures) is restitutionary and is dependent on the Court first finding that plaintiffs are entitled to the equitable relief sought (restoration of health and welfare benefits). Therefore, defendant argues, the money damages are equitable relief, not legal relief.

The Eleventh Circuit has held that there is no right to a jury trial under ERISA § 502(a)(1). *Blake v. Unionmutual*

Stock Life Ins. Co., 906 F.2d 1525 (11th Cir. 1990); *Chilton*, 814 F.2d at 623. The Court of Appeals stated in *Blake* that plaintiffs were not entitled to a jury trial because their claims were equitable in nature. 906 F.2d at 1526. The Court agrees with defendant that the money damages sought in this action (recoupment of health expenditures) are equitable in nature. Because the Court has determined that plaintiffs in this case are entitled only to equitable relief, the Court determines that plaintiffs are not entitled to a jury trial.

III. Plaintiffs' Motion for Preliminary Injunction

Finally, plaintiffs have filed a supplemental motion for preliminary injunction. Plaintiffs filed their first preliminary injunction motion in July, 1991. Judge Evans held an evidentiary hearing on July 31, 1991, and subsequently denied plaintiffs' motion on December 16, 1991. Plaintiffs appealed the Court's decision. On January 5, 1993, the Eleventh Circuit reversed the Court's December 16, 1991 decision and remanded the case for further proceedings. *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 704 (11th Cir. 1993). The trial court had concluded that the language of the collective bargaining agreement between the employees' union and defendant unambiguously established defendant's right to modify their health benefits; therefore, plaintiffs had not demonstrated a substantial likelihood of success on the merits of their claims. The Eleventh Circuit concluded, however, that both parties had offered reasonable interpretations of the

agreements which established that the contract is ambiguous; therefore, the trial court should have considered the extrinsic evidence offered by the parties. *Id.*

A district court may issue injunctive relief only when the movant can establish the following elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not disserve the public interest. *Cheffer v. McGregor,* 6 F.3d 705, 710 (11th Cir. 1993) (quoting *Tally-Ho, Inc. v. Coast Community College District,* 889 F.2d 1018, 1022 (11th Cir. 1989). Because a preliminary injunction is an extraordinary and drastic remedy, one should not issue unless the plaintiff clearly satisfies the burden of persuasion as to these four prerequisites. *The News-Journal Corp. v. Foxman,* 939 F.2d 1499, 1511 (11th Cir. 1991).

After considering the extrinsic evidence offered by the parties, the Court concludes that plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims. First, plaintiffs contend that the agreements, when construed in light of the context in which the parties bargained, provided the defendant only with the right to modify, after expiration of the agreements, the health and welfare benefits of active employees upon retirement, but not with the right to modify the health and welfare benefits of already retired employees. Plaintiffs have presented evidence – such as negotiation history, past practice evidence, alleged verbal and written representations made to employees and retirees, and alleged admissions made by the former

owner of the plant – which supports their contention that the health and welfare benefits of retirees were vested upon retirement and that the 1984 and 1986 CBA's did not grant defendant the right to modify these benefits. However, because defendant has presented evidence to counter both the alleged facts and the interpretation of these alleged facts, the Court concludes that plaintiffs have not presented evidence that is sufficient to demonstrate that they have a *substantial* likelihood of success on the merits. Thus, the Court denies plaintiffs' motion for preliminary injunction.

IV. Conclusion

In summary, the Court GRANTS defendant's motion for extension of time to file reply memoranda to plaintiffs' response memoranda to defendant's motions to transfer venue and to strike certain claims by plaintiffs and plaintiffs' demand for a jury trial [#70]; GRANTS plaintiffs' motion for leave to file a response to defendant's reply memorandum in support of defendant's motion to transfer venue [#75]; DENIES defendant's motion to transfer venue in this action [#62]; GRANTS defendant's motion to strike plaintiffs' claims for compensatory, emotional distress, and exemplary damages and plaintiffs' demand for a jury trial [#63]; DENIES plaintiffs' supplemental motion for preliminary injunction [#54]; and GRANTS defendant's motion to substitute counsel of record in this action [#57].

IT IS SO ORDERED, this 13th day of January, 1994.

/s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

APPENDIX 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD STEWART, et al, Plaintiffs, v. KHD OF AMERICA, CORPORATION, Defendant	:	CIVIL ACTION 1:91-CV-1534MHS

ORDER

(Filed Mar. 15, 1994)

This action is before the court on ~~defendant's~~ plas' motion for certification of the Court's Order of January 13, 1994 for interlocutory review. For the reasons stated below, the Court certifies its Order for review.

Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory review when the court believes that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . . " 28 U.S.C. § 1292(b). In this action, ~~defendants~~ plas' seek interlocutory review of one issue: whether plaintiffs are entitled to a jury trial of their breach of contract claims under § 301 of the Labor Management Relations Act, where those claims are joined with claims under the Employment Retirement Income Security Act of 1974, which are not triable to a jury, in an action to

restore retiree health benefits and recover damages for breach of contract.

The Court agrees with ~~defendant~~ plas that the issue involves a controlling issue of law as to which there is substantial ground for difference of opinion and that a decision on the issue would advance this litigation. Therefore, the Court CERTIFIES its Order of January 13, 1994 for interlocutory review, and GRANTS ~~defendant's~~ plas' motion for an order granting leave to appeal.

IT IS SO ORDERED, this 14 day of March, 1994.

/s/ Marvin H. Shoob
Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

APPENDIX 4

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-1078

(Filed May 13, 1994)

RONALD STEWART, DAVID KIRCHHOFF, DARRELL HOWARD, LOUIS KUBITSCHEK, JOHN TUCKNESS, and RONALD KELTNER, on behalf of themselves and other persons similarly situated,

Petitioners,

versus

KHD DEUTZ OF AMERICA CORPORATION,

Respondent.

On Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: KRAVITCH, COX and CARNES, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. §1292(b) is granted.

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8547

RONALD STEWART,
DAVID KIRCHOFF,
DARRELL L. HOWARD,
LOUIS KUBITSCHEK
JOHN TUCKNESS,
RONALD KELTNER, on behalf of themselves and other persons similarly situated,
Plaintiff-Appellants,

versus

KHD DEUTZ OF AMERICA CORPORATION,
Defendant-Appellee.

(Filed May 15, 1996)

On Appeal from the United States
District Court for Northern District of Georgia

BEFORE: HATCHETT, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellee, KHD Deutz of America Corporation, is Denied.

ENTERED FOR THE COURT:

/s/ J. Hatchett
UNITED STATES CIRCUIT JUDGE

APPENDIX 6

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD STEWART, DAVID KIRCHOFF, DARRELL L. HOWARD, LOUIS KUBITSCHEK, JOHN TUCKNESS and RONALD KELTNER behalf of themselves and other persons similarly situated Plaintiffs, v. KHD DEUTZ OF AMERICA CORPORATION, Defendant.	Complaint – Class Action Civil Action No. _____ 1:91 -CV-1534-ODE

COMPLAINT – CLASS ACTION

Introduction

(Filed Jul. 5 1991)

1. Plaintiffs bring this action for declaratory, injunctive, and monetary relief to secure their rights to retirement benefits which they earned in exchange for lifetimes of hard labor. The benefits were to be provided under a collectively bargained agreement entered into by the United Steelworkers of America, AFL-CIO-CLC (hereinafter, the "Union") and Deutz-Allis Corporation ("Deutz Allis"), a wholly owned subsidiary of defendant KHD Deutz of America Corporation (hereinafter referred to as "KHD Deutz", the "Company" or "Defendant"). The

benefits were to be provided pursuant to insurance agreements that guaranteed certain retiring employees, and their dependents continuous health and medical insurance coverage. KHD Deutz has unilaterally acted to reduce the benefits provided to plaintiffs and to charge plaintiffs a large monthly premium, despite the fact that retired beneficiaries of the health insurance agreements enjoy vested rights to such benefits which cannot be altered without the beneficiaries' consent. By refusing to provide benefits required by the insurance agreements and by failing to pay the full cost of such benefits as required by the agreements, KHD Deutz is in violation of Section 301 of the Labor Management Relation Act, 29 U.S.C. §185 (hereinafter, the "LMRA") and Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132 (hereinafter "ERISA").

Jurisdiction and Venue

2. This Court has jurisdiction over this action pursuant to Section 301(a) of the LMRA, 29 U.S.C. §185(a), and Sections 502(e) and (f) of ERISA, 29 U.S.C. §1132(e) and (f).

3. Venue over this action lies in this Court pursuant to Section 301(a) of the LMRA, 29 U.S.C. §185(a), and Section 502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2).

Parties

4. Plaintiffs are retirees who retired from the Deutz-Allis Corporation combine plant in Independence, Missouri during the period from May 26, 1985 to December

31, 1989. On May 25, 1985, KHD Deutz of American Corporation purchased the Independence plant from the Allis-Chalmers Manufacturing Company. Defendant, through its wholly-owned subsidiary, Deutz-Allis Corporation, assumed the collective bargaining agreement between Allis-Chalmers and the United Steelworkers of America and its Local 1958 and assumed responsibility to provide benefits to all employees retiring on or after May 26, 1985. On June 21, 1990, defendant KHD Deutz sold Deutz-Allis and its Independence plant to Allis Gleaner Corporation and Gleaner Combine Corporation. Pursuant to the sales agreement, defendant retained responsibility for all health and life insurance benefit programs for employees retiring prior to January 1, 1990.

5. Plaintiffs retired under either the March 1, 1984 to February 14, 1987 Agreement Covering Health, Accident, Disability, Dental, Vision, Group Life Insurance and Transition and Bridge Benefit Plans (hereinafter "1984 Insurance Agreement"), which was adopted and assumed by defendant's wholly-owned subsidiary, Deutz-Allis Corporation, on September 26, 1985, or the May 18, 1986 to May 19, 1989 Agreement Covering Health, Accident, Disability, Dental, Vision, Group Life Insurance and Transition and Bridge Benefit Plans (hereinafter "1986 Insurance Agreement").

6. KHD Deutz, the parent company of Deutz-Allis Corporation, is an employer engaged in commerce as defined in Sections 2(2) and 2(6) of the LMRA, 29 U.S.C. §152(2) and (6), and is a plan sponsor, fiduciary and administrator, as defined in Sections 3(16)(B), 3(21)(A) and 3(16)(A) of ERISA, 29 U.S.C. §§1002(16)(B), 1002(21)(A) and 1002(16)(A), of the retiree health and

medical insurance plans described in the 1984 Insurance Agreement and the 1986 Insurance Agreement. KHD Deutz's principal place of business is located at 3220 Pointe Parkway, Norcross, Georgia.

7. The 1984 Insurance Agreement and the 1986 Insurance Agreement are "employee welfare benefit plans" as defined in §3(1) of ERISA, 29 U.S.C. §1002(1).

COUNT I

(BREACH OF CONTRACT UNDER SECTION 301 OF THE LMRA)

8. Paragraphs 1 through 7 are realleged and incorporated herein by reference.

9. The 1984 Insurance Agreement and the 1986 Insurance Agreement are the product of collective bargaining between Deutz-Allis, defendant's wholly-owned subsidiary; Deutz-Allis' predecessor, Allis-Chalmers; and the United Steelworkers of America and its Local 1958 ("the Union").

10. The "Extended Coverage" provisions of the 1984 and 1986 Insurance Agreements specify that employees who have been continuously covered under the insurance plans for ten years and over shall be provided extended medical coverage, without being required to make partial premium payments, "during retirement."

11. The parties' intent was that retiree insurance continue throughout retirement.

12. After the June 21, 1990 purchase of Deutz-Allis from KHD Deutz by Allis Gleaner Corporation and Gleaner Combine Corporation Deutz-Allis sent a letter to

all retirees specifying that KHD Deutz would retain responsibility for all health and life insurance benefits programs for personnel retiring prior to January 1, 1990. In a letter dated March 26, 1991, the President of KHD Deutz, Peter Rudhart, reiterated that KHD Deutz has retained responsibility for health and fire insurance benefits which were provided on account of retirements from Deutz-Allis prior to 1990.

13. Despite the plaintiffs' vested contractual right to the health insurance benefits specified under the 1984 and 1986 Insurance Agreements, at no cost to them, the Company has acted unilaterally to reduce the benefits available to retired Plan beneficiaries, by introducing, among other changes, deductibles of $500 per individual and $1,000 per family as well as a 20% co-payment for expenses incurred above the deductible amount, up to a maximum of $1,500 per individual and $3,000 per family. In addition, the lifetime maximum benefit was reduced to $250,000. These changes, and others, are described in correspondence mailed to the retirees. Defendant additionally unilaterally acted to charge retirees premiums of as much as $312.96 per month for coverage for a retiree and his dependent who are both under age 65.

14. While the Company continues to refuse to provide at no cost the insurance coverage to which individual plaintiffs are entitled, said plaintiffs will have to provide that coverage for themselves at substantial expense or, if they cannot purchase such coverage themselves, pay their medical bills as they become due, or do without necessary medical care.

15. The Company's reduction in the plaintiffs' benefits and the Company's charging of monthly premiums forces the plaintiffs to make decisions concerning their health and physical well-being based upon the expenses they can afford rather than on the basis of what they and their physicians deem most appropriate.

16. As a result of the Company's actions, plaintiffs will suffer irreparable injury.

17. Plaintiffs have no adequate remedy at law to redress the injury they will suffer on account of the Company's actions.

18. The Company's reduction of health benefits without recognizing the rights of retired employees and their dependents to benefits that have already vested and the Company's charging of monthly premiums, are contrary to the terms of the collectively bargained 1984 and 1986 Insurance Agreements and therefore violate Section 301 of the LMRA, 29 U.S.C. §185.

COUNT II

(VIOLATION OF INSURANCE AGREEMENTS UNDER SECTION 502 OF ERISA)

19. Paragraphs 1 throught [sic] 17 are realleged and incorporated herein by reference.

20. As set forth in paragraphs 8 through 12 above, the 1984 and 1986 Insurance Agreements require that eligible retiring employees and their dependents be provided the health and medical insurance benefits in effect at the time of their retirement for life.

21. The defendant has refused to provide eligible retirees and dependents with the insurance benefits in effect at the time of their retirement at no cost to the retirees.

22. By refusing to provide these benefits at no cost to the retirees, the defendant is in violation of its statutory obligations to the participants of the employee welfare benefit plans, including the individual plaintiffs named in this complaint. Specifically, the defendant is depriving the participants of their rights under Sections 502(a)(1)(B) and (a)(3) of ERISA, 29 U.S.C. §1132(a)(1)(B) and §1132(a)(3), by acting in violation of the express terms of the 1984 and 1986 Insurance Agreements and other plan documents.

COUNT III

(BREACH OF FIDUCIARY DUTIES UNDER SECTION 404 AND 502 OF ERISA)

23. Paragraphs 1 through 21 are realleged and incorporated herein by reference.

24. The Company is a fiduciary with respect to the employee benefit plans, as defined in Section 2(21) of ERISA, 29 U.S.C. §1002(21)(A), because it exercises discretionary authority, discretionary control, or discretionary responsibility with respect to management or administration of the plans and because it exercises authority and control with respect to management or disposition of the assets of the plans.

25. As a fiduciary, the Company is obligated under Section 404(a) of ERISA, 29 U.S.C. §1104(a), to discharge

its duties with respect to the plans solely in the interest of the participants and for the exclusive purpose of providing benefits to the participants. In addition, the Company is obligated to discharge its duties in accordance with the documents and instruments governing the plans.

26. As a fiduciary with conflicting interests, the Company bears the burden of justifying its decisions with respect to the plans and with respect to benefits available under the plans.

27. In taking the actions set forth in paragraphs 12 through 25 above, the Company has acted contrary to the interests of the plans' participants and for its own benefit. Specifically, by not continuing to provide, at no cost to retirees, insurance benefits at the level to which the plan participants are entitled under the documents and instruments governing the plans, the Company is profiting while plan participants suffer.

28. Upon information and belief, these actions of the Company are willful, malicious, and taken in bad faith.

29. By failing to provide, at no cost to retirees, insurance benefits at the level at which the plan participants are entitled, the Company is in breach of the fiduciary duties it owes under Section 404(a) of ERISA, 29 U.S.C. §1104(a), to participants in the plans, including the individual plaintiffs named in this complaint. In addition, by breaching these duties, the Company thereby violates Section 404(a) of ERISA, 29 U.S.C. §1104(a), by failing to discharge its duties solely in the interests of the plan participants and by failing to discharge its duties in

accordance with the documents and instruments governing the plans.

COUNT IV

(EQUITABLE ESTOPPEL)

30. Paragraphs 1 through 28 are realleged and incorporated [sic] reference herein.

31. The duration clauses of the 1984 and 1986 Insurance Agreements are ambiguous such that reasonable persons could disagree as to their meaning or effect. On numerous occasions defendant has represented to plan participants and others that the retiree benefits under the 1984 and 1986 Insurance Agreements last throughout retirement. Such representations constitute an oral interpretation of the ambiguous duration clauses.

32. On some occasions the Company received financial benefits by making these representations.

33. The participants to whom defendant made the representations have materially changed their positions as a result.

COUNT V

(A CLAIM AGAINST THE COMPANY FOR CAUSING A FIDUCIARY BREACH)

34. Paragraphs 1 through 32 are realleged and incorporated by reference herein.

35. As an alternative to Count III, plaintiffs allege that even if the Company is not a fiduciary, it intentionally induced, directed, and caused the fiduciary

to engage in the above-described breaches of fiduciary duty.

CLASS ACTION ALLEGATIONS

36. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and other persons similarly situated.

37. Plaintiffs seek to represent a class consisting of all individuals (and their spouses and dependents) who were employed by Deutz-Allis Corporation, a wholly-owned subsidiary of defendant, at the combine plant in Independence, Missouri and were represented by the USWA; who retired from Deutz-Allis between May 24, 1985 and January 1, 1990 under the terms of either the 1984 or the 1986 Insurance Agreement; who were, prior to June 1, 1991, a participant or beneficiary in KHD Deutz's employee benefit plans; and who have suffered as a result of KHD Deutz's reduction in retiree insurance benefits and institution of monthly premiums.

38. Joinder of the members of the class, numbering approximately 125 individuals, would be impracticable.

39. This case depends on the resolution of common questions of fact and law affecting all members of the class, including whether the 1984 and 1986 Insurance Agreements and other documents and instruments governing the plans require that the defendant continue to provide, at no cost, the class members with continuous health and medical benefits specified by the appropriate insurance agreement and whether the defendant has taken the unlawful actions alleged.

40. Plaintiffs' claims are typical of those of the members of the class they seek to represent.

41. Plaintiffs will fairly and adequately protect the interests of the proposed class because their claims are identical to those of the members of that class and because they have secured the representation of attorneys who are skilled and knowledgeable in the prosecution of litigation of this kind.

42. This action may be maintained as a class action under Rule 23(b)(2) because the unlawful actions of the defendant alleged in this complaint have been taken on grounds generally applicable to all members of the class, thereby making appropriate preliminary and final injunctive relief and corresponding monetary and declaratory relief with respect to the class as a whole.

JURY TRIAL DEMAND

43. As essential elements of plaintiffs' claims are legal in nature, plaintiffs demand that their case be tried before a jury.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request the following relief after trial by jury:

(1) That pending the filing of an answer and the hearing and determination of this action, the Court grant plaintiffs a preliminary injunction, enjoining defendant from decreasing benefits provided to retirees prior to June 1, 1991 under the 1984 Agreement Covering Health, Accident, Disability, Dental, Vision, Group Life Insurance

and Transition and Bridge Benefit Plans ("1984 Insurance Agreement") and the 1986 Agreement Covering Health, Accident, Disability, Dental, Vision, Group Life Insurance and Transition and Bridge Benefit Plans ("1986 Insurance Agreement"); that the Court enjoin defendants from increasing the deductible, copayment and maximum out-of-pocket amount paid by retirees prior to June 1, 1991 for benefits under the 1984 and 1986 Insurance Agreements; and that the Court enjoin defendant from charging retirees a monthly premium for benefits under the 1984 and 1986 Insurance Agreements.

(2) That the Court declare that the Company has violated its contractual obligations under the collectively bargained 1984 and 1986 Insurance Agreements;

(3) That the Court order the Company to perform its contractual obligations to all class members under the 1984 and 1986 Insurance Agreements;

(4) That the Court declare that the Company has violated its obligations under the 1984 and 1986 Insurance Agreements and under ERISA;

(5) That the Court order the Company and the Plan to perform their obligations under the 1984 and 1986 Insurance Agreements and under ERISA;

(6) That the Court award monetary damages to restore all affected class members to the position in which they would have been but for the defendant's contractual and statutory violations;

(7) The the [sic] Court declare that the Company is equitably estopped from altering, modifying, deleting or decreasing the benefits to which plaintiffs are entitled

and from requiring plaintiffs to pay a monthly premium for those benefits;

(8) That the Court award the plaintiffs compensatory damages, including damages for emotional distress, and exemplary damages; and

(9) That the Court award the plaintiffs their attorneys' fees, costs, and any other appropriate relief.

Respectfully submitted,

JOLLEY, WALSH & HAGER, P.C.
204 West Linwood Blvd.
Kansas City, Missouri 64111
Tel: (816) 561-3755

By /s/ Janae L. Schaeffer
Janae L. Schaeffer
/s/ John P. Hurley
John P. Hurley

and

JACOBS & LANGFORD, P.A.
100 Peachtree St., N.W.
Equitable Building, Suite 1000
Atlanta, Georgia 30303

By /s/ James T. Langford
James T. Langford
Bar No. 436125

Supreme Court, U.S.
FILED
SEP 12 1996
CLERK

No. 96-250

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KHD DEUTZ OF AMERICA CORPORATION,
Petitioner,
v.
RONALD STEWART, DAVID KIRCHOFF, DARRELL L. HOWARD, LOUIS KUBITSCHEK, JOHN TUCKNESS AND RONALD KELTNER, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

ANDREW D. ROTH
Counsel of Record
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990) 3, 4, 6, 7
Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir.), *cert. denied*, 116 S. Ct. 180 (1995) .. 6, 7
Curtis v. Loether, 415 U.S. 189 (1974) 4
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) 4
Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir. 1996), *pet. for cert. pending*, No. 95-1662 (Apr. 17, 1996) 4, 5
Miller v. Robertson, 266 U.S. 243 (1924) 3
Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960) .. 7
Ross v. Bernhard, 396 U.S. 531 (1970) 4
Scott v. Neely, 140 U.S. 106 (1891) 3
Senn v. United Dominion Indus., 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) 2
Tull v. United States, 481 U.S. 412 (1987) 4
UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 3

STATUTES

ERISA § 502, 29 U.S.C. § 1132 1
ERISA § 514(d), 29 U.S.C. § 1144(d) 3, 6
LMRA § 301, 29 U.S.C. § 185 ..... *passim*

MISCELLANEOUS

Restatement (Second) of Contracts § 344 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-250

KHD DEUTZ OF AMERICA CORPORATION,
Petitioner,

v.

RONALD STEWART, DAVID KIRCHOFF, DARRELL L. HOWARD, LOUIS KUBITSCHEK, JOHN TUCKNESS AND RONALD KELTNER, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In June of 1991, Petitioner KHD Deutz of America Corporation (the "Company") unilaterally implemented a reduction in the collectively-bargained health benefits provided to its retired employees. Respondents, a group of Company retirees, brought this class action in July of 1991 under both § 301 of the Labor Management Relations Act ("LMRA") and § 502 of the Employee Retirement Income and Security Act ("ERISA"). The retirees' complaint (a) alleged that the reduction in their health benefits violated the terms of the governing collective bargaining agreements; and (b) sought both injunctive relief and "monetary damages to restore all affected class mem-

bers to the position in which they would have been but for the defendant's contractual and statutory violations." Petitioner's Appendix ("Pet. App.") at 45.[1]

The trial court denied two motions by the retirees for preliminary injunctive relief, and also struck the retirees' demand for a jury trial on their LMRA § 301 claims for breach of contract damages.[2] The Eleventh Circuit allowed an interlocutory appeal on the jury trial question, and reversed in a 3-0 panel decision.

In reversing, the Eleventh Circuit expressly "join[ed]" the holding of the Seventh Circuit in *Senn v. United Dominion Indus.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993), that "plaintiffs are entitled to a jury trial in hybrid LMRA/ERISA actions." Pet. App. at 14. And, in so doing, the Eleventh Circuit tracked the Seventh Circuit's rationale in *Senn*.

First, the Eleventh Circuit found that "monetary relief sought pursuant to section 301 of the LMRA is legal in nature," thus entitling the retirees to a jury trial under the Seventh Amendment on their LMRA § 301 damages claims. Pet. App. at 11; *accord Senn*, 951 F.2d at 813.

Second, the Eleventh Circuit found that the retirees did not forfeit their constitutional right to a jury trial on their legal LMRA § 301 damages claims by joining those claims with equitable ERISA claims. Pet. App. at 11-12; *accord Senn*, 951 F.2d at 813-14.

The Eleventh Circuit also rejected the Company's alternative argument that "the comprehensive scheme of ERISA warrants the denial of the retirees' right to a

---

[1] The retirees also prayed for *extra*-contractual damages, *see* Pet. App. at 46, which were held to be unavailable by the trial court and are not at issue here.

[2] Section 301 provides, in pertinent part, that "[s]uits *for violation of contracts* between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185 (emphasis added).

jury trial on their section 301 claim." Pet. App. at 13. The court of appeals did so because "section 514(d) of ERISA explicitly saves federal causes of action including section 301 of the LMRA," and because "the Federal Rules of Civil Procedure . . . allow liberal joinder of legal and equitable actions, and the Declaratory Judgment Act . . . preserves the right to a jury trial to both parties." *Id.* at 13-14 (footnote and citations omitted).

ARGUMENT

1. The decision below faithfully follows this Court's jury trial precedents and is in accord with the one other court of appeals' decision on point. There being no basis for plenary consideration the *certiorari* petition should be denied.

a. The retirees' rights and remedies under LMRA § 301 are plainly of a legal nature. This Court has made it plain that a claim under LMRA § 301 for violation of a collective bargaining agreement "is comparable to a breach of contract claim" and that such a claim therefore presents "a legal issue." *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 570 (1990); *see also UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.7 (1966). And, the remedy that the retirees seek under LMRA § 301—"monetary damages to restore all affected class members to the position in which they would have been but for" the Company's violation of the governing collective bargaining agreements—is the classic *legal* remedy for breach of contract. *See Scott v. Neely*, 140 U.S. 106, 110 (1891); *Miller v. Robertson*, 266 U.S. 243, 257 (1924); Restatement (Second) of Contracts § 344, cmt. a (1981).

In short, what this Court has said with respect to a damages claim for breach of a contract for exclusive use of a trademark is equally on point with respect to the LMRA § 301 damages claim asserted by the retirees here: "[I]t would be difficult to conceive of an action of

a more traditionally legal character." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962). It follows that the retirees have a Seventh Amendment right to a jury trial on their LMRA § 301 damages claims. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 194 (1974); *Tull v. United States*, 481 U.S. 412, 417 (1987); *Terry*, 494 U.S. at 564-65.

b. It is equally well-settled that

> if [a] legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.

Curtis v. Loether, 415 U.S. at 196 n.11; *accord, e.g., Tull*, 481 U.S. at 425; *Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970); *Dairy Queen*, 369 U.S. at 470-73.

On this ground, the court below was unquestionably correct in holding that the retirees did not forfeit their constitutional right to a jury trial on their legal LMRA § 301 damages claims by joining those claims with equitable ERISA claims.

2. The Company posits a conflict between the decision below and the contemporaneous decision of the Sixth Circuit in *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996), *pet. for cert. pending*, No. 95-1662 (Apr. 17, 1996). *See* Petition ("Pet.") at 7-9. There is no such conflict.

The 2-1 panel decision in *Golden* rests on a rule that by its terms has *no* application here. There, less than three months after the alleged contractual breach, the trial court granted a motion for preliminary injunctive relief that ended the breach and prevented any further monetary loss to the plaintiffs. Thus, the monetary relief at issue in *Golden* was "for the amount of loss the[] [plaintiffs] incurred between January 1 and March 17." 73 F.3d at

661. In that context the Sixth Circuit ruled that "[s]uch damages are exactly the type of monetary relief that courts, and the *Restatement*, envision as equitable relief; they are incidental to the grant of equitable relief, yet are necessary to afford complete relief." *Id.*

That limited ruling has no conceivable application to this case. Here, the retirees were denied preliminary injunctive relief by the trial court, and more than five years of breach of contract damages have accumulated in the meantime. Thus, even on the *Golden* majority's rationale, it is impossible to characterize the retirees' legal claim for damages under LMRA § 301 as merely "incidental" to their equitable ERISA claims. Indeed, as the dissenting judge in *Golden* observed without any objection from the *Golden* majority, "if there had been no preliminary injunction, and benefits had been withheld during the pendency of this action[,] then damages would be considerable and the court would have to find a right to trial by jury." *Id.* at 665.

3. The Company also urges as a ground for review that the decision below is erroneous on at least one of two alternative grounds. *See* Pet. App. at 9-25. We have already shown that the decision below follows ineluctably from this Court's decisions. *See supra* pp. 3-4. Not surprisingly, then, the Company's arguments that the court below committed error are without substance.

a. The Company argues first that ERISA displaces LMRA § 301 remedies in circumstances where the remedies available under the two statutes are coterminous, thus leaving plaintiffs who seek to recover unpaid benefits under a collectively-bargained plan with only equitable ERISA claims (and hence no constitutional right to a jury trial). *See* Pet. at 13-20.

There have been numerous "hybrid" cases brought under both LMRA § 301 and ERISA based on the failure of a company to pay collectively-bargained retiree bene-

fits, and *no* court in any of these cases has ever held that ERISA displaces LMRA § 301 remedies in this context. Thus, the Company is forced to patch together a hodgepodge of cases that are not remotely on point in an effort to support its novel "displacement" theory. The short but complete answer to the Company's construct is, as the court below held, that ERISA § 514(d), 29 U.S.C. § 1144(d), "explicitly saves federal causes of action including section 301 of the LMRA." *See supra* pp. 2-3.

b. The Company's alternative argument is that "even if" the retirees' LMRA § 301 remedies are not displaced by ERISA, the retirees' claim for breach of contract damages should be deemed "equitable" on the theory that that claim is " 'incidental to or intertwined with' " the retirees' claim for equitable injunctive relief. *See* Pet. at 20-25 (quoting *Terry*, 494 U.S. at 571).

Here again, *no* court in any "hybrid" LMRA/ERISA action has ever held that a claim for a substantial amount of breach of contract damages (here, more than five years worth) can be deemed "equitable" for Seventh Amendment purposes on the ground that the plaintiff also seeks equitable injunctive relief under ERISA. And, indeed, as the court below observed, any such holding would fly in the face of this Court's longstanding rule that the Seventh Amendment right to a jury trial on a legal claim "cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *See supra* p. 4.

The District of Columbia Circuit has supplied a more painstaking analysis of this same point in its recent decision in *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir.), *cert. denied*, 116 S. Ct. 180 (1995), upholding the right to a jury trial on a claim for backpay under the Employee Protection Program of the Airline Deregulation Act of 1978.

In *Crocker*, the court began by explaining that this Court's statement in *Terry* that "a monetary award in-

cidental to or intertwined with injunctive relief may be equitable," 494 U.S. at 571, cannot be read as referring "to the relative worth of the back pay and equitable claims at a particular point in the litigation," because "[t]he Court has repeatedly and firmly insisted that the right to a jury trial on a legal claim cannot be extinguished because modern procedural devices have brought it together in the same suit as an equitable claim." 49 F.3d at 748.

The *Crocker* court went on to explain that

> [i]t appears instead that the status of a claim as "intertwined" or "incidental" with injunctive relief depends on the remedial structure of the statutory scheme. The Supreme Court has characterized lost-wage and backpay remedies as equitable when the power to award such amounts was derived from a statutory grant of equitable authority. In *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960)—the sole example of intertwining cited by *Terry*—the Court found that § 17 of the Fair Labor Standards Act, 29 U.S.C. § 217, which gave the district courts explicit power to enjoin certain retaliatory discharges, implicitly also gave them power to award whatever supplementary relief was necessary to further the purposes of the statute, including lost wages. The Court characterized this implied power as equitable, not because lost-wage relief inherently sounds in equity, but rather because it arose derivatively from the equitable injunction powers granted by the statute.

Id. (footnote and citations omitted).

The foregoing ground for characterizing a statutory damages claim as "equitable" for Seventh Amendment purposes has no conceivable application to the independent LMRA § 301 damages claim at issue here, which as this Court has recognized is a quintessential *legal* claim. *See supra* pp. 3-4.

CONCLUSION

For the reasons stated, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

ANDREW D. ROTH
Counsel of Record
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222